Supreme Court, U.S.
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In the Supreme Court of the United States
OCTOBER TERM, 1996

ROSLYN UNION FREE SCHOOL DISTRICT NO. 3 et al.,

Petitioners,

-against-

EMILY HSU, by and through her next friend, DR. CHIN-CHING HSU, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STANLEY A. CAMHI
(Counsel of Record)

CAROL M. HOFFMAN
JASPAN SCHLESINGER
SILVERMAN & HOFFMAN LLP
Counsel for Petitioners
300 Garden City Plaza
Garden City, NY 11530
(516) 746-8000

QUESTIONS PRESENTED

1. Does a student's right to engage in religious speech and activities in school pursuant to the Equal Access Act include the right to engage in conduct consisting of acts of religious or other discrimination against fellow students when such conduct infringes upon the rights of those students not to be subjected to discrimination while attending school?

2. Does the Equal Access Act require a public school district to exempt a student religion club from the district's established nondiscrimination policies so that the club may discriminate against members of the student body on the basis of their religion by imposing a requirement that a student possess a particular religious belief as a condition of becoming an officer of the club?

3. Whether a public school district violates the Establishment Clause by exempting a student religion club from its generally applicable nondiscrimination policies so that the club may discriminate against members of the student body based upon their religious beliefs?

LIST OF PARTIES

The parties to the proceeding below as required by Supreme Court Rules 14.1(b) and 29.6 are as follows:

Appellants Below:

1. Emily Hsu, plaintiff
2. Timothy Hsu, plaintiff
3. Chin-Ching Hsu, as plaintiffs' next friend, plaintiff

Appellees Below:

4. Roslyn Union Free School District, defendant
5. Michael Barkan, President of the Roslyn Union Free School District Board of Education, defendant*
6. Asenath Anderson, Vice President of the Board of Education, defendant*
7. William Costigan, Member of the Board of Education, defendant
8. Pat Schissel, Member of the Board of Education, defendant
9. Ellen Seigel, Member of the Board of Education, defendant
10. Alvin Silverman, Member of the Board of Education, defendant
11. Frank Tassone, Superintendent of the Roslyn Union Free School District, defendant
12. Marilyn Silverman, Assistant Superintendent of the Roslyn Union Free School District, defendant
13. Mark Weyne, Principal of Roslyn High School, defendant*
14. Howard Rubin, Principal of Roslyn High School, defendant*

The Roslyn Union Free School District is a public corporation and has no parent company, subsidiary or affiliate.

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*This individual no longer holds this position.

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No.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, Roslyn Union Free School District ("District"), its board members and several of its officials, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, dated May 15, 1996, rehearing of which was denied by the court on July 23, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 85 F.3d 839, and is reprinted as Appendix A. The order of the Court of Appeals for the Second Circuit filed July 23, 1996 denying the petition for rehearing with a suggestion for rehearing *en banc* is not reported and is reprinted as Appendix B. The memorandum and order of the United States District Court of the Eastern District of New York is reported at 876 F. Supp. 445, and is reprinted as Appendix C.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The district court's jurisdiction was invoked pursuant to 28 U.S.C. §§1331, 1343 (3), 1367(a), 2201.

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . . or the right of the people to peaceably assemble . . . ."

Equal Access Act, P.L. 98-377, 98 Stat. 1303, 20 U.S.C. §§4071-4074 is reprinted as Appendix D.

STATEMENT OF THE CASE

Roslyn School District's Nondiscrimination Policies

Roslyn Union Free School District, located in New York, has a student population of 2,600 students. The District has established policies which prohibit discrimination against students based upon, *inter alia*, their race, sex or religion and which also prohibit students from being excluded from participating in the school's extracurricular activities upon such basis. The District's nondiscrimination policies are reprinted as Appendix E. All student clubs are required to abide by the District's nondiscrimination policies.

The Bible Club's Application

On September 29, 1993, respondent, Emily Hsu ("Emily"), a senior at Roslyn High School ("RHS") and another student, met with the school's principal and informed him that they wanted to start a student Christian fellowship club called the "Walking on Water" club. The request was forwarded to Marilyn Silverman, the District's Assistant Superintendent for Curriculum and Instruction.

After receiving the request, Ms. Silverman met with Emily to discuss the proposed club. She informed Emily that, in accordance with District policy, all new student clubs had to be approved by the District's Board of Education ("Board"). Emily was told that the Board would discuss her request at its December 2, 1993 public meeting. She was invited to attend the meeting and to address the Board. No formal action was

taken by the Board at the meeting but Emily was asked to prepare a club constitution. All student clubs at RHS are required to have constitutions. As a result, Emily prepared a proposed constitution and presented it to Ms. Silverman on January 5, 1994. Among its provisions were the following:

ARTICLE II - Purpose

Section I — This club will provide a time of praise for students to gather in Christian fellowship.

a. Christian fellowship is when Christians gather to praise God, . . ." (emphasis added)

* * *

ARTICLE III - Election and Officers

* * *

Section II — Officers must be professed Christians, either through baptism or confirmation. (emphasis added)

The constitution, as submitted, is reprinted as Appendix F.

Emily was advised by Ms. Silverman, as well as by Dr. Frank A. Tassone, the Superintendent of Schools, that these two provisions violated the District's nondiscrimination policies which require that all student clubs be open to all students, regardless of their religious beliefs. Thereafter, Emily revised the first provision, (Article II, Section I), by substituting the word "people" for "Christians," thereby eliminating its discriminatory impact. With regard to the second provision, (Article III, Section II), she substituted the

following:

> All members eligible to vote will also be eligible to run for offices. Accepting Jesus Christ as savior is a requirement for all officers. (emphasis added)

This revision did not eliminate the problem since it conditioned eligibility to hold office in the club on a student possessing a particular religious belief.

On March 10, 1994, the Board adopted a resolution approving the formation of the club with the condition that it comply with the District's nondiscrimination policies. The Board's Resolution is reprinted as Appendix G. As a result, the club was allowed to form. Students who joined the club could meet for all purposes set forth in the club's constitution, including "Christian fellowship," prayer, the giving of "testimony" and "singspiration". In addition, the club could hold its meetings at the school and utilize the school's facilities to the same extent as any other student club. The club, however, could not exclude students from participation in the club because of their religious beliefs and could not discriminate against members of the student body by requiring that they subscribe to a particular religious belief as a condition for holding office. The Board's resolution did not require that a "non-believer" be elected to a leadership position. As with all other student clubs, the club members would elect whomever they felt could best lead the club.

After approval by the Board, Emily was advised to contact the school principal to arrange for an organizational meeting. She refused to do so purportedly because she did not

want to risk the possibility that a non-Christian might be elected an officer of the club, despite the fact that only Christian students had indicated a desire to become officers.

The Lawsuit

In February 1994, Emily and her brother Timothy (collectively "Hsus") filed suit in district court asserting that the Board's requirement that the club comply with the District's nondiscrimination policies violated the Equal Access Act ("Act" or "EAA"), the First Amendment to the United States Constitution, the Religious Freedom Restoration Act, 107 Stat. 1488, 42 U.S.C. §2000 bb et seq. ("RFRA") and provisions of the New York State constitution, and moved for a preliminary injunction enjoining the District from requiring that the club comply with the policies. Petitioners cross-moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(c). Both sides submitted affidavits in support of their motions.

The District's Superintendent, Dr. Tassone, in his affidavit, explained why the nondiscrimination policies were adopted by the Board, why uniform compliance with the policies was necessary, how violation of the policies would adversely impact upon the District's ability to carry out its educational mission and how an exemption for the club would entangle the District in religious matters. Dr. Tassone's affidavit is reprinted as Appendix H. He noted that the students who attend RHS range in age from fourteen to eighteen and are

still within their formative years. (A 152)[1] He explained that it is critical that all students know that, while at school, they will be treated fairly, based upon their ability and performance, and that their treatment and the educational opportunities available to them are not based upon their religion, sex or the color of their skin. (A 152) He emphasized that one of the District's educational goals is to develop an harmonious student community based upon mutual respect and self-esteem, and not one which affords rights and privileges to a select group of students based upon a discriminatory criteria. (A 152-153)

Dr. Tassone also explained that allowing the club to discriminate would lead to excessive entanglement by the District in religious matters. If a student wished to run for club office and was denied the opportunity to do so because some club members felt that he was not sincere in his religious beliefs, the student would obviously turn to the District for help. If the District ignored his pleas, it would send a message to the student community that the District had endorsed the club's religion by affording it special protection and privileges not available to other clubs. On the other hand, if the District took action, it would be placed in the position of having to examine and evaluate the nature, depth and sincerity of the student's religious beliefs to determine if he satisfied the club's eligibility requirement. It would also have to determine whether the students who sought to preclude him from office were motivated by a legitimate religious interest. (A 154-155)

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[1]Number references prefixed with the letter "A" refer to pages in the Appendix.

The District Court's Opinion

On February 21, 1995, the district court denied the Hsus' motion for a preliminary injunction and denied petitioners' cross-motion to dismiss. With respect to the EAA claim, the court identified the core statutory issue as whether the EAA requires the school district to exempt a student-initiated and student-led club from its nondiscrimination policies which apply to all student clubs, in order to permit the club to exclude students from running for office upon the basis of their religious beliefs, although the club is open to all students on a voluntary basis. In analyzing this issue, the court first looked at the plain language of the Act and noted that "equal access" provides a student religion club the right to meet on school property on the same basis as other non-curriculum related clubs. The court found that the District satisfied its obligation under the Act. Since all student clubs were required to comply with the District's nondiscrimination policies, the court concluded that the bible club was afforded access equal to that of the other clubs. In reaching its conclusion, the district court observed that when this Court upheld the constitutionality of the EAA in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 232 (1990), it did so in connection with a bible club in which participation was open to all students regardless of their religious affiliation.

The district court also found that the District's requirement that the club abide by its nondiscrimination policies did not influence the "form or content" of the club's religious speech since the club's members could engage in the religious activities of their choice and select, without District

involvement, the students whom they wanted to lead them in prayer or other religious activity. It recognized that "[t]o allow an exemption from the nondiscrimination policy, the School District would be tolerating, if not expressly sanctioning, conduct that would be unconstitutional for it to engage in directly." (A 96)

The district court also rejected the Hsus' claim that the District's nondiscrimination policies violated the Establishment Clause. The Court analyzed the District's policies under the three prong test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and concluded that the District's policies satisfied all three prongs. The court noted that "[j]ust as a message of exclusion is conveyed where school officials refuse to let a student religious group use school facilities during nonschool hours, but allow other noncurriculum-related groups to meet during that time, *see Mergens,* [citation omitted], a message of exclusion is conveyed where school officials permit discrimination against students by allowing - - through exemption of a neutral and generally applicable policy - - a student religious club to condition eligibility to run for office upon students' religious beliefs." (A 105)

The court recognized that by enforcing its neutral, generally applicable policies, the District did not convey a message that religion or particular religious beliefs were favored or disfavored. It also recognized that the *uniform* application of the policies was necessary to avoid excessive entanglement by the District in religious matters since an exception would conceivably require it to determine the genuineness and validity of a students' religious beliefs.

Finally, the court acknowledged that the District had a compelling interest in preventing discrimination on its campus and that permitting the club to discriminate would be disruptive to its educational mission. It recognized that discrimination by the club would impinge upon the rights of other students to be free from discrimination and that the policies were needed to protect the rights of all students.

The Court of Appeals' Opinion

The Hsus appealed to the Court of Appeals for the Second Circuit and petitioners cross-appealed the denial of their motion to dismiss. On May 15, 1996, the Second Circuit issued its decision affirming in part, reversing in part and remanding the case to the district court for issuance of an injunction against petitioners requiring them to exempt the club from the District's nondiscrimination policies so that the club could discriminate against members of the student body with regard to three of the club's officer positions - - President, Vice President and Music Coordinator. Although the matter was before the Second Circuit on the denial of the Hsus' motion for a preliminary injunction, the court treated the district court's decision as if it was a grant of summary judgment. The court concluded that the only real dispute presented in the case was the correct legal standard to apply to the factual record. Relying upon *Thornburgh v. American College*, 476 U.S. 747 (1986) *rev'd on other grounds, Planned Parenthood v. Casey*, 505 U.S. 833 (1992) the court conducted a "plenary review" and decided the case as if it was an appeal on the merits. (A 15-16)

The Second Circuit, in reaching its decision, relied exclusively on the EAA. In interpreting the Act, the court said that "equal access" means that students engaging in religious speech have the same rights to associate and to speak as students who wish to discuss other topics. Although the District based its decision not to exempt the club from its policies due to the discriminatory conduct it wanted to engage in, the court, nevertheless, relying heavily on this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ____ U.S. ____, 115 S. Ct. 2338 (1995), viewed the club's leadership requirement as religious speech. It found that the discrimination was designed to assure that a certain type of speech would take place at the club's meetings, (A 28) and that it, therefore, "affected the religious . . . content of the speech at [the] meeting within the meaning of [the Act]." (A 31) It concluded that the leadership provision was defensible with regard to these three officers because "guaranteeing that these officers will be dedicated Christians assures that the Club's programs will . . . be imbued with certain qualities of commitment and spirituality." (A 30-31) It reasoned that the club's leadership provision merely required that the club's officers have a "certain level of commitment to the program and purpose of the Club," (A 37) and, since it assumed that other student clubs could also require a level of commitment from their leaders,[2] leaving the provision intact simply gave the club "access" equal to that given to other student clubs.

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[2]The court, however, acknowledged that there was nothing in the record to indicate that other clubs imposed "commitment" requirements on their leaders. (A 36-37)

The court of appeals rejected the District's argument that granting a religion club an exemption from its neutral, generally applicable nondiscrimination policies would violate the Establishment Clause. Instead, it held that granting an exemption was consistent with the requirements of *Lemon*. It also found that an exception from the policies for the club would not violate the Equal Protection Clause. According to the court, state actions that allow religious discrimination only by religious groups impose no burdens on non-religious groups and do not subordinate or stigmatize them. (A 58)

Petitioners timely filed a petition for rehearing with a suggestion for rehearing *en banc*, which was denied by the court of appeals without comment on July 23, 1996.

REASONS FOR GRANTING THE WRIT

This case, which is one of first impression, raises novel issues of national importance involving the separation of church and state, the right of students to engage in religious activities in school when those activities infringe upon the protected fundamental rights of their fellow students, and the ability of our public schools to maintain order and discipline within the schools, make educational decisions regarding their students and carry out their educational mission. Although the court of appeals attempted to portray its decision as a narrow one, its implications are broad and far reaching. According to the Second Circuit, a public school may not uniformly require all students to abide by a policy which prohibits discrimination on its campus. Instead, it must allow a student religious group to discriminate against other students based upon their religion

in violation of those students' rights, when the alleged purpose of the discrimination is to assure the religious character of the group's meetings.

This holding is truly remarkable for several reasons. First, it categorizes as religious speech within the meaning of the EAA overt *acts* of discrimination by some students against other members of the student body.

Second, the decision prohibits a public school from enforcing *uniform* standards of conduct which its school officials determine are necessary for the welfare of its students and to accomplish its educational mission. The Roslyn School District required the club to comply with its nondiscrimination policies because it determined that allowing it to discriminate against students based upon their religion would be divisive and disruptive to the District's educational mission and would be detrimental to the well-being of the student population which is entrusted to its care. (A 152)

Third, the Second Circuit's decision requires the school district to exempt certain students from its nondiscrimination policies, which are content and viewpoint neutral, in order to "assure" that the club's program will be imbued with qualities of "commitment" and "spirituality," in effect requiring the District to provide the club with a *guarantee* that a particular type of religious speech will take place on its campus.

The court of appeals failed to properly recognize the deference which must be afforded to public school officials in managing their institutions. The decision strikes at the heart of

a school district's ability to maintain order and discipline, protect the rights of all students, fight discrimination and carry out its educational mission. Specifically, it forces the Roslyn School District to engage in conduct which is antithetical to its educational philosophy, violates the constitutional and statutory rights of a vast number of students and is in clear violation of the Establishment Clause.

A. Neither the Legislative History of the Equal Access Act nor the Language of the Statute Support the Court of Appeals' Decision.

The court of appeals reached its conclusion that the Walking on Water club was entitled to discriminate against other students based upon a tortured reading of the Equal Access Act. The Act was intended to eliminate what was perceived by some as hostility by school officials toward religion and was designed to protect students from religious discrimination. The Second Circuit's decision turns the statute on its head by using it to affirmatively authorize religious discrimination by the very group of students which it was intended to protect.

The Act was adopted to settle confusion which had developed in the nation's public schools as to whether student-initiated and student-led religious clubs were entitled to *meet* on school grounds and engage in religious speech. Nothing in its legislative history suggests that Congress ever intended or envisioned that the Act would serve as a vehicle to enable one group of students to discriminate against other students on the basis of their religion.

The Act, which was intended to codify this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981) and extend it to public secondary schools, was designed to prevent discrimination against religious speech, not give it a privileged status among other forms of speech in public schools. H.R. Rep. No. 710, 98th Cong., 2d Sess. 7 (1984) [hereinafter, "HR"]. *Widmar* does not hold or even suggest that a religious group seeking access to school facilities is entitled to greater privileges than those which are available to other student groups. Indeed, it is the *equal* treatment of all groups which avoids an Establishment Clause violation. The House Report specifically notes that in implementing the Act "a school must apply the same objective criteria to religious and nonreligious student initiated meetings." HR at 7. Despite the legislative history, the court of appeals' decision requires the Roslyn School District to apply different criteria for meetings of student religious clubs than it applies to nonreligious clubs. It requires school officials to allow religion clubs privileges it does not allow other clubs and to tend to the club's religious concerns when they would not tend to similar concerns of nonreligious groups.

It is also clear from a plain reading of the statute that its reach is not so wide as to encompass the discriminatory activity in which the club wants to engage. The EAA simply prohibits a school from denying "equal access or a fair opportunity to . . . any students who wish to conduct a meeting . . . on the basis of the religious, . . . or other content of the speech at such meetings. 20 U.S.C. §4071(a) While the statute demands that a school provide a "fair opportunity" to meet without consideration of the religious nature or other content of the

speech which will occur at the meeting, it does not require a school to provide a guarantee that *only* a particular type of religious speech will occur at the meeting or to assure that the meeting will be imbued with a certain level of religious spirituality. Indeed, the Act demands that it not be construed in such a way since to do so would certainly result in the school influencing the "form or content" of prayer and other religious activity which is specifically prohibited. 20 U.S.C. §4071(d)(1) The Act also mandates that it not be construed in a manner so as to authorize the sanctioning of meetings that are otherwise unlawful,[3] 20 U.S.C. §4071(d)(5), or to abridge the constitutional rights of any person.[4] 20 U.S.C. §4071(d)(7) Most significantly, it requires that the Act not be construed "to limit the authority of the school . . . to maintain order and discipline on school premises, [and] to protect the well-being of students and faculty." 20 U.S.C. §4071(f) The court of appeals disregarded these required rules of construction to achieve the result it wanted. In doing so, the court trivialized the impact on the students who are subjected to the acts of discrimination and whose own constitutional and statutory rights are infringed, and ignored the District's determination

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[3]Discrimination based upon religion, as well as other criteria such as sex, race and nationality are prohibited by federal and state law. See e.g., 42 U.S.C. §1983, 20 U.S.C. §1681, N.Y. Const. art. 11, §1, N.Y. Civ. Rts. Law §44-a; N.Y. Exec. Law §296.

[4]The constitutional rights of a large number of students would be abridged by the District approving and thus endorsing the club's discriminatory provisions. Those students' rights to free exercise of religion, association and speech are abridged by a club condition which requires them to hold a particular religious belief to fully participate in a school authorized student activity.

that a uniformly applied nondiscrimination policy was needed to maintain order and discipline and carry out its educational mission.

Despite the lack of statutory authority for its decision the court, nevertheless, found that the Act required the District to allow the club to engage in its religious discrimination. The court's reliance on *Hurley*, in reaching its decision, is misplaced. *Hurley* did not involve the EAA. In *Hurley*, a private group organizing the annual St. Patrick's Day parade refused to let an Irish gay pride group march with a gay pride banner despite a state law prohibiting discrimination on the basis of sexual orientation. Gays and lesbians, however, were not generally excluded from marching. This Court held that the parade organizers could exclude the gay pride group since by doing so the organizers sought to tailor their own message and, if the group was not excluded, the organizers would be compelled to include within their speech a message with which they did not agree. The school district's requirement that the club comply with its nondiscrimination policies does not compel the club to include a message with which it does not agree. The club's members are free to elect whomever they believe will be the most appropriate leader. It is unlikely, if not impossible, that the members would elect someone to lead them whose message is at odds with their own. Moreover, unlike the club's requirement which precludes non-Christians from even being considered for a leadership position, the parade organizers in *Hurley* did not preclude gays and lesbians from participating in all aspects of the parade, including, theoretically, leading the parade. Most importantly, however, the court of appeals failed to recognize that there is a

significant difference between allowing discrimination by a private group on a public street and discrimination by an officially recognized student club in a school setting. If any analogy to *Hurley* is appropriate in the context of this case, it is the school district acting as the parade organizer with the Walking on Water club seeking to march along side the other student clubs in the District's parade.

In addition, the court of appeals based its equal access analysis on its assumption that all student clubs can require a level of commitment from their leaders as a condition of eligibility to hold office and that the religion club's leadership requirement was no different than a means of assuring that the club's leaders have a level of commitment to the goals of the club. The comparison is not appropriate. A commitment requirement which requires an evaluation of the sincerity of a person's beliefs and impacts and infringes upon the rights of other students is certainly not the same as a promise by a student that he will behave in a particular way.[5] The court's reasoning is also flawed. Simply because a student is baptized or affirms a belief in Jesus Christ does not mean that he is pious or religious, or that his speech will be consistent with the club's religious speech, or that he will be committed to furthering the goals of the club. Nevertheless, he can be president. On the other hand, a student of good morale character who has demonstrated his commitment to the club by devoting his time, effort and energy to furthering the club's religious and nonreligious activities, cannot even be considered for office

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[5]The Court suggested for example, that Students Against Drunk Driving ("SADD") could require its officers to pledge not to drink. (A 37)

simply if he was born into the "wrong religion."[6]

B. The Court of Appeals Failed to Properly Recognize that School Officials are Entitled to Establish Uniform Rules of Conduct for their Students and Must be Able to do so to Maintain Order and Discipline and Protect the Rights and Well Being of all Students.

This Court has long recognized that "education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Public education prepares pupils for citizenship. Its objective is to inculcate the habits and manners of civility as fundamental values necessary to a democratic society. *Bethel School District v. Fraser*, 478 U.S. 675, 681 (1986). In achieving these goals, school districts are afforded considerable discretion in how they operate their schools. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In order to achieve their educational goals, public school administrators must be able to develop and establish clear, uniform standards of conduct for

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[6]If commitment was, in fact, an issue the club could utilize objective nondiscriminatory criteria to make certain that its leaders are committed to achieving the club's goals. For example, it could require that candidates for office demonstrate their commitment by attending a certain percentage of club meetings or by participating in a specified number of club activities. In fact, the club's proposed constitution includes a provision requiring members to attend two-thirds of the club's meetings in order to vote for officers. The club's constitution also protects the membership from an officer who is not committed to the club by providing that officers can be impeached if they are remiss in performing their duties. (A 131)

the good of the entire school community which are fair, unbiased and applied in an evenhanded manner to protect the rights and well-being of all students entrusted to their care. This is particularly true with respect to the treatment students receive not only from teachers and administrators, but from their fellow students as well. Uniformly applied nondiscrimination policies let all students know that, at least while they are attending school, they will be treated fairly based upon their performance and ability and not upon invidious criteria.

This Court has repeatedly acknowledged that the rights of students must be applied in light of the special characteristics of the school environment. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 925 (1969). In upholding the constitutionality of the Equal Access Act, this Court specifically reaffirmed that a school district is not required to abdicate its general supervisory authority over school activities and that school districts "retain a significant measure of authority over the type of officially recognized activities in which their students participate." *Mergens*, 496 U.S. at 240-241. By requiring the Walking on Water club to abide by its nondiscrimination policies, the Roslyn School District was simply exercising the authority which this Court acknowledged it retains.

Moreover, this Court has also firmly established that schools need not tolerate student speech which is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988), and

that schools have a right to enforce reasonable rules and regulations and require that its students comply with standards of conduct as a condition of official recognition. *Healy v. James*, 408 U.S. 169, 192-193 (1972). Indeed, a school is permitted to condition a student group's right to meet on its willingness to adhere to "reasonable campus law" even if the requirement impacts on First Amendment rights of association and speech. As Justice Powell stated in *Healy*,

> Such a requirement [adhering to reasonable campus law] does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.

408 U.S. at 193.

There can be no doubt that the District's nondiscrimination policy is a "reasonable campus law" and that the District has a compelling interest in prohibiting unlawful discrimination on its campus. However, it is the policy's uniform application to all students which gives it substance and makes it meaningful. A policy which is not only perceived as fair but is, in fact, fair is a fundamental cornerstone of the District's educational mission whose ultimate goal is to develop its students into good citizens. The court of appeals' decision, by requiring the District to exempt a group of students from its

coverage, removed the District's best weapon against bigotry and prejudice on its campus and opened the schoolhouse gate to hate groups cloaked in religious garb who would turn the campus into a religious battleground.

The EAA does not just protect mainstream religions. Under the Act *any* student who wants to start a religious club in a public high school is entitled to do so regardless of the religious content of the speech at such meetings. According to the Second Circuit, any student who expresses a religious need to discriminate against other students, at least with respect to a leadership position, allegedly to insure a level of "commitment" and "spirituality" would be entitled to an exemption from the District's nondiscrimination policies. The holding effectively authorizes the creation of private student enclaves, empowered by the Board, which may discriminate as they see fit under a claim of religious freedom. Is a school district required to tolerate discrimination against females or African-Americans if a student asserts that in his religion they lack the necessary "commitment" or "spirituality" to safeguard the "spiritual content" of his club's meetings, or claims that the discrimination is "vital" for his group to define itself on the basis of shared faith? The court of appeals would apparently require it. Once the gate is opened, there will be no way to control the flow of who passes through it. The Equal Protection Clause will extend this "privilege" to political and other groups which are also authorized by the EAA, including hate groups who assert that their need to discriminate is also vital to their expression and their ability to define themselves on the basis of their shared beliefs.

C. If the Roslyn School District Exempts the Religion Club from its Neutral Generally Applicable Nondiscrimination Policies, the District Will Violate the Establishment Clause.

The Second Circuit's mandate requires the Roslyn School District to exempt the Walking on Water club from its nondiscrimination policies. Since the establishment of all new student clubs must be approved by the School Board, official recognition of the club with its leadership condition intact is effectively the same as a resolution passed by the Board authorizing the club to discriminate against students on the basis of their religion. Certainly, a Board resolution declaring that the Walking on Water club is entitled to discriminate against students who do not believe in Jesus Christ in the selection of its officers would violate the Establishment Clause. It makes no difference whether the Board allows the club to discriminate with "a wink and a nod" or grants the club the privilege by proclamation, the end result is the same - - Board approval of the club's discriminatory leadership provision in order to guarantee that a particular type of religious speech will occur at the club's meetings.

The religion clause of the First Amendment provides that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. The Establishment Clause is a specific prohibition on forms of government intervention in religious affairs. *Lee v. Weisman*, 505 U.S. 577, 591 (1992). The First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers." *School Dist. of*

Abington Township, Penn. v. Schempp, 374 U.S. 203, 218 (1963), *citing Everson v. Board of Education*, 330 U.S. 1 (1947). A government may not prefer one religion over another and may not send messages to non-adherents that they are outsiders and that adherents are insiders. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989). To facilitate an analysis of whether a government enactment is in harmony with the Establishment Clause, this Court developed a three prong test. *Lemon*, 403 U.S. at 612-613. To pass constitutional muster *Lemon* requires, 1) that the government policy at issue have a secular purpose, 2) that its principal or primary effect not advance or inhibit religion, and 3) that it not foster excessive government entanglement with religion.

The District's nondiscrimination policies satisfy all three prongs. This Court recognized in *Mergens* that a government enactment whose purpose is to prevent discrimination is undeniably secular. *Mergens*, 496 U.S. at 249. Moreover, the primary purpose of the District's policies are not to advance or inhibit religion. A student's religious beliefs are an irrelevant consideration. The even application of the policies to all student clubs, including the Christian religion club, conveys a message of neutrality. At the same time, the club is able to engage in all of its religious activities and engage in religious speech without government interference. Its members may pray together, give testimony and enjoy "singspiration." In addition, requiring the club to abide by the District's policies avoids excessive government entanglement in religious matters. It allows the club's members to elect their own leaders without an artificial, government endorsed barrier,

which limits their choice to a select pool of candidates who publicly subscribe to a specific religious belief. The District's policies do not require the club's members to elect a student whose religious beliefs are incompatible with their own. Every member of the club may vote for the candidate of his or her choice, exercising his or her vote to elect the student whom the member believes is the most qualified - - including, casting a vote for the candidate whose religious beliefs are most consistent with his or her own. The only effect of the District's requirement that the club abide by its nondiscrimination policies is that the authority of the District is not used to provide the club with a *guarantee* that a student possessing a particular religious belief will be elected to office.

Despite the fact that the District's policies fully satisfy the *Lemon* test, the court of appeals, based upon its erroneous assumption that the EAA required the District to exempt the club from its nondiscrimination policies, analyzed the Establishment Clause issue from that perspective. Its conclusion, that an exemption would not violate the Establishment Clause, is flawed for several reasons. First it failed to give proper consideration to the setting in which the action was occurring. This Court has repeatedly recognized that particular vigilance against an Establishment Clause violation is required when secondary schools are involved, *Mergens*, 496 U.S. at 264 (Marshal, J. concurring), *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987), and that a heightened concern is necessary in protecting against subtle coercive pressure in elementary and secondary schools. *Lee*, 505 U.S. at 592. This heightened concern results from recognition that secondary school students, although young adults, are

nevertheless impressionable and may be influenced by the appearance of a school district's endorsement of religion. *Edwards,* 482 U.S. at 584.

A District approved exemption for the club fails the *Lemon* test. Obviously, a government exemption for a religious group from a generally applicable policy so that the group can achieve a religious goal does not have a secular purpose.

Granting the Walking on Water club an exemption from the District's policy has the primary effect of advancing its religion. It is tantamount to an announcement by the District that the student Christian religion club is above the law; that its members do not have to abide by the same standards of conduct applicable to every other student; that they are entitled to special privileges; that they may violate the fundamental rights of other students; and that they may ignore basic principles of fairness with impunity. Instead of conveying a message of government neutrality, it sends a message that the club's religion is favored at the expense of all others. Justice Kennedy's admonition in *Lee v. Weisman* is particularly appropriate in the context of this case,

> What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to a nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

505 U.S. at 592. The Establishment Clause proscribes public

schools from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred, even if the schools do not actually impose pressure on students to participate in a religious activity. *Lee*, 505 U.S. at 604 (Blackmun, J. concurring).

The message of a preferred or favored status is precisely what is conveyed by the grant of an exemption from one of the District's most basic and important policies. The Walking on Water club is not just a religious group, it is a *school* club. By seeking to establish a school club, the Hsus were seeking more than simply having a private gathering for religious purposes. They wanted the full range of benefits and privileges commensurate with those available to other school clubs, as well as the legitimacy afforded by official recognition. While allowing the club to meet on the same basis as all other clubs in and of itself does not convey a message of favored status, a special exemption, approved by the school board, conveys a clear message of endorsement. This is particularly so in the context of the closed community of a school which students are compelled to attend. An exemption does not merely facilitate access to the school for the club, it encourages and pressures those students who want to fully participate in the club's activities to embrace, with the District's apparent approval, those religious beliefs that would entitle them to the full benefits of club membership, and would remove them as a target of the club's discrimination. This is not a mere accommodation of the needs of religious students but a "symbolic union between church and state." As a result, an exception for the club is not the same as an exemption from a nondiscrimination statute afforded a *private* religious group in

non-school setting or relief from a rule which has no direct impact on the rights of others.

The court of appeals failed to appreciate the extent to which a public school will become entangled in religious matters if it is required to exempt a religion club from its nondiscrimination policy. The EAA prohibits a school district from denying "equal access" to any student who wishes to conduct a meeting on the basis of the religious, political, philosophical or other content of the speech at such meeting. The result is that any student may establish a student religion club to promote his own religious beliefs and, under the Second Circuit's holding, may discriminate against students who lack the "commitment" or "spirituality" necessary to safeguard the expressive content of the meetings when it is vital to the group's ability to define itself on the basis of shared beliefs. This forces school officials into the role of evaluating the legitimacy of the student's religion and the sincerity of his religious beliefs. It requires the District to determine in the first instance whether the proposed discrimination is based on a true religious tenet or is simply a preference expressed in religious terms in order to obtain a special government authorized privilege and whether it is vital to those religious beliefs. School officials should not be making judgments about the nature, depth, requirements and legitimacy of a student's religious beliefs, feelings and thoughts.

In the context of this case, an exemption from a universally applied nondiscrimination policy forces the District to determine the sincerity of the religious beliefs of those students who want to become officers of the club. A student

denied the opportunity to hold office because some club members believe he or she has not truly accepted Jesus Christ as his or her Savior would seek relief from the District. The District would either have to turn the student away, further reinforcing a perception of official approval of respondents' religious beliefs, or be forced to evaluate the sincerity of the student's religious beliefs to determine whether the student satisfied the club's eligibility criteria. The District would also have to determine whether the members who refused to allow the student to run for office did so in furtherance of a legitimate, sincerely held religious belief which was "vital" to the group's ability to define itself or whether they were motivated by some other purpose.

The court of appeals' solution to the problem - - letting the club internally resolve leadership disputes until the "squabbling gets out of hand", (A54), is a naive, unrealistic, and possibly dangerous response and intrudes into an area of educational decisionmaking into which courts should not venture. Public schools already have a difficult enough time maintaining peace and harmony on their campuses. Whether it is a proper *educational* response to allow problems among students to fester to the point where they "get out of hand" before any action can be taken is an educational judgment. There is nothing in the decision which suggests that the court of appeals considered its "solution" from an educational point of view and nothing in the record which supports it from an educational standpoint. The "hands off" approach mandated by the court of appeals is certainly not consistent with the equal access required by the EAA since no other student club would be permitted to allow a similar situation to boil out of control

without the District stepping in. The Act specifically provides that "nothing in this [Act] shall be construed to limit the authority of the school . . . to maintain order and discipline on school premises . . . " 20 U.S.C. §4071(f), yet this is precisely what the court of appeals has done.

The review and reversal of the court of appeals' decision is essential to clarify the meaning and scope of the Equal Access Act, to protect students from unlawful discrimination, to reaffirm a public school district's right to establish uniform standards of conduct for its students and to preserve the protections intended by the Establishment Clause.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Garden City, New York
October 7, 1996

Respectfully submitted

STANLEY A. CAMHI
(Counsel of Record)
CAROL M. HOFFMAN
JASPAN SCHLESINGER
SILVERMAN & HOFFMAN LLP
Attorneys for Petitioners
300 Garden City Plaza
Garden City, NY 11530
(516) 746-8000

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 332, 471--August Term 1995
(Argued: November 1, 1995 Decided: May 15, 1996)
Docket Nos. 95-7311, 95-7333

Emily HSU and Timothy Hsu, By andThrough their next friend, Dr. Chin-Ching Hsu,

Plaintiffs-Appellants-Cross-Appellees,

v.

ROSLYN UNION FREE SCHOOL DISTRICT NO. 3; Michael Barkan, in his official capacity as President of the Roslyn Union Free School District Board of Education; Asenath Anderson, in her official capacity as Vice President of Roslyn Union Free School District Board of Education; William Costigan; Barbara Schwartz; Pat Schissel; Ellen Seigel; Alvin Silverman, in their official capacities as members of the Roslyn Union Free School District Board of Education; Dr. Frank Tassone, in his official capacity as Superintendent of Roslyn Union Free School District; Marilyn Silverman, in her official capacity as Assistant Superintendent of

Roslyn Union Free School District; Mark Weyne, in his official capacity as Principal of Roslyn High School; and Dr. Howard Rubin, in his official capacity as Principal of Roslyn High School,

Defendants-Appellees-Cross-Appellants.

Before:

VAN GRAAFEILAND, JACOBS and PARKER, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Eastern District of New York (Leonard D. Wexler, J.). A public high school refused to authorize the formation of a student Bible club, because the club's proposed charter required that all officers be Christian. The student founders of the club brought suit under the Equal Access Act, *inter alia*, and moved for a preliminary injunction. The district court denied the motion and the students appealed. Affirmed in part, reversed in part, and remanded for the district court to issue a preliminary injunction. Judge Van Graafeiland files a separate opinion, concurring in part and dissenting in part.

JAY ALAN SEKULOW, American Center for Law & Justice: Religious Liberties Project, Washington, DC (James Matthew Henderson, Sr., Stuart J. Roth, and Joel H.

Thornton, American Center for Law & Justice, Religious Liberties Project, Washington, DC; Keith A. Fournier, American Center for Law & Justice, Virginia Beach, VA; Joseph P. Infranco, Migliore & Infranco, Commack, NY; on the brief), *for Plaintiffs-Appellants-Cross-Appellees*.

STANLEY A. CAMHI, Garden City, NY (John O. Fronce, Jaspan, Ginsberg, Schlesinger, Silverman & Hoffman, Garden City, NY, on the brief), *for Defendants-Appellees-Cross-Appellants*.

(Steven Arenson, Arenson, Dittmar & Karban, New York, NY, and Steven M. Freeman and Debbie N. Kaminer, Anti-Defamation League, New York, NY, filed a brief, *for Amicus Curiae Anti-Defamation League*.)

(Steven T. McFarland, Kimberlee Wood Colby, and Samuel B. Casey, Center for Law & Religious Freedom: Christian Legal Society, Annandale, VA, and Michael S. Paulsen, Minneapolis, MN, filed a brief, for *Amici Curiae Christian Legal Society, National Council of Churches of Christ, National Association of Evangelicals, and Christian Life Commission of the Southern Baptist Convention*.)

(Mathew D. Staver, Frederick H. Nelson, and Nicole Arfaras Kerr, Liberty Counsel, Orlando, FL, filed a brief, for *Amicus Curiae Liberty Counsel*.)

(Jay Warona, Pilar Sokol, and Cheryl Randall, New York State School Boards Association, Albany, NY, filed a brief, for *Amicus Curiae New York State School Boards Association.*)

JACOBS, *Circuit Judge*:

Under the Equal Access Act, 20 U.S.C. §§ 4071-4074, public school students who wish to pray and study the Bible together after school enjoy the same right to meet in school classrooms as other extracurricular groups. The school can avoid the requirements of the Equal Access Act by prohibiting all "noncurriculum related" student groups or by declining federal funding. In this case, a public high school subject to the Act negotiated to impasse with a small group of students who wanted to form an after-school Bible Club. Agreement was reached on every aspect of the club's status and operation, but one. The students insisted on a club charter provision that only Christians could be club officers; the school refused recognition on the sole ground that this condition violated the school policy prohibiting all student groups from discriminating on the basis of (among other things) religion. The students sued, and moved for a preliminary injunction that would force the school to recognize the club. The United States District Court for the Eastern District of New York (Leonard D. Wexler, J.) denied the motion. We review that denial.

We conclude that the club's Christian officer requirement, as applied to some of the club's officers, is essential to the expressive content of the meetings and to the

group's preservation of its purpose and identity, and is therefore protected by the Equal Access Act. This application of the Act is constitutional because the school's recognition of the club will not draw the school into an establishment of religion or impair the school's efforts to prevent invidious discrimination. We therefore affirm in part and reverse in part.

I. Facts

Except for some immaterial details of chronology, the following facts are undisputed in the complaint, the answer, and the affidavits submitted to the district court.[1]

Roslyn High School (the "School") is a public school serving grades nine through twelve. Located in Roslyn, New

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[1] "[I]n granting or refusing interlocutory injunctions the court shall [ ] set forth the findings of fact . . . ," which we must accept unless they are "clearly erroneous." Fed. R. Civ. P. 52(a). Here, the district court relied on the facts as alleged by the plaintiffs without actually making any independent factual determinations. 876 F.Supp. 445, 448 (E.D.N.Y. 1995). As in *Sampson v. Murray*, 415 U.S. 61, 86 n. 58 (1974), where the district court failed to make any findings of fact under Rule 52(a), "we do not think that we are thereby foreclosed from examining the record to determine if sufficient allegations or sufficient evidence supports" the district court's injunctive ruling. *See also Professional Ass'n of College Educators v. El Paso County Community College Dist.*, 730 F.2d 258, 273 (5th Cir.) (examining the record after district court issued injunctive ruling without making "express findings of fact"), *cert. denied*, 469 U.S. 881 (1984). We therefore examine the record and, given the preliminary procedural posture of this case, ask whether injunctive relief is warranted based on the undisputed facts. *See Genovese Drug Stores, Inc. v. Connecticut Packing Co.*, 732 F.2d 286, 292 (2d Cir. 1984) (reversing "[o]n the undisputed facts" a district court's injunctive ruling).

York, the School is part of the Roslyn Union Free School District (the "District"). The District is governed by a Board of Education (the "Board"), which employs a Superintendent to implement its policies.

In September 1993, as Emily Hsu began her senior year at Roslyn High and her brother Timothy entered as a freshman, Emily met with the school's principal, Mark Weyne, to ask if she could form an after-school Christian Bible Club (the "Club"). He told her that he would look into it, and referred the matter to the office of the District Superintendent. In November 1993, the Assistant Superintendent for Curriculum and Instruction, Marilyn Silverman, met with Emily and Jane Shin (another Roslyn High student interested in forming a Bible club) "to obtain additional information about the club." Emily was told that the Board would discuss the Club at a December 2 meeting. Emily, Jane, and a third interested student, Johnny Whang, attended the meeting. After Emily and Jane explained their proposal to the Board, the Board had a "broad ranging discussion of the issue" and postponed final decision. Emily claims that during that discussion: a Board member stated that School officials did not want the Club to meet, but that they were legally required to grant the Club access; a second Board member suggested that the District should stop accepting federal funds in order to avoid the mandate of the Equal Access Act; and the Board indicated that it was tabling the proposal so that it could study in greater depth the consequences of forgoing federal money.

Several weeks after the Board meeting, Emily and Jane met with Silverman and Roslyn High's new principal, Howard

Rubin. The two administrators asked the two students to submit a written constitution describing the proposed Club, so that the Board could make a fully informed decision about whether to recognize it.[2]

In early January 1994, Emily delivered to Silverman the Club's proposed constitution. Article I stated that the "Walking on Water" club would be open to all Roslyn High School students "regardless of race, color, age, religion, sex, national origin, or physical handicap." Article II stated that the Club would provide "a time of praise for students to gather in Christian fellowship," which was defined as a time "when Christians gather to praise God . . . " (the "Christian fellowship provision"). Fellowship would be provided "in the form of singspiration[, that is,] singing inspirational music which exalts the Lord Jesus Christ . . . ." Article III described the Club's

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[2] The District claims that "student clubs typically have written constitutions" and that District schools ask students to submit a constitution "where the purpose and activities of a proposed club are not clear." The plaintiffs suggest that the requirement of a written constitution was improvised to thwart the creation of the Bible Club, and point to a memo sent on February 10, 1994 by Roslyn High principal Howard Rubin to student club leaders:

> We have been informed by the school attorney that every club or activity at Roslyn High School must have a constitution. If your club or activity has a constitution, please return it to my office by Monday, February 14. If your club or activity does not have a constitution, please indicate that below.

The District claims that all clubs identified as not having constitutions were asked to submit one to the School.

weekly, hour-long meetings. Meetings would open and close with a prayer. The first half of the meetings would consist of "singspiration." The second half might include more prayer, more "singspiration," testimonies from students about their belief in Jesus Christ, guest speakers, skits, games, or Bible study. According to the Hsus, these activities were to be consistent with the Club's overarching goal of spending an hour of spirituality together "to praise God." Article IV listed potential projects for the Club, including volunteer community service, charitable fund raising, and picnics.

Article V concerned "Elections and Officers." Officers were to be elected in May for the following academic year by a majority vote of those students who attended two-thirds of the Club's meetings during the year. Five officer positions were created: President, Vice-President, Secretary, Music Coordinator, and Activities Counselor. The President would be "responsible for the overall spiritual direction and oversight of the Bible club . . . [and] the spiritual content of the regular weekly meetings," and the Vice-President would help perform these responsibilities. The Secretary would take the minutes and do the accounting. Both the Vice-President and Secretary were to "be prepared to perform the presidential functions" in the President's absence. The Music Coordinator would select the "praise and worship songs" and "lead the singing and worship of the Lord" at "Singspiration time." The Activities Coordinator would plan the community service work, charitable fundraising, and picnics. All officers had to be prepared "to open or close a meeting with prayer or to lead a Bible study," and "to give testimony to the life-changing presence of Jesus Christ in his/her life." Article V required that

all of these officers be "professed Christians either through baptism or confirmation" (the "leadership provision"). That provision is the bone of contention here.

In late January, Silverman and Rubin again met with Emily and Jane. They explained to the students that two provisions of the Club's constitution were unacceptable: the provision defining Christian fellowship as a gathering of "Christians," and the provision limiting officers to "professed Christians." Emily responded by crossing out the word "Christians" in the Christian fellowship provision, and writing in the more inclusionary word, "people." Emily was more unbending as to the School's second objection, however, and wrote the following sentences in the margin of the leadership provision: "All members eligible to vote will also be eligible to run for offices. Accepting Jesus Christ as savior is a requirement for all officers." (The second sentence thus imposed an eligibility requirement not implicit in the first sentence.)

The two administrators and two students met again on January 26. Silverman and Rubin explained to Emily and Jane that because the constitution's leadership provision still restricted officers to "professed Christians" and those who have "accepted Jesus Christ as savior," it violated the District's "nondiscrimination policy." This policy is embodied in two "equal opportunity statements" previously adopted by the Board. The first statement prohibits the Board from discriminating against any student "on the basis of race, color, national origin, creed or religion, marital status, sex, age or handicapping condition," in providing "access to . . . student

activities." The second statement requires that the District

> provide every student with equal educational opportunities regardless of race, color, creed, sex, national origin, religion, age, marital status, or disability. No student will be excluded on such basis from participating in or having access to any course offerings, athletics, counseling, employment assistance, *extracurricular activities* or other school resources.

(Emphasis added.) The Walking on Water Club's exclusionary leadership policy violates the District's nondiscrimination policy, as all parties agree.

On January 31, Emily resubmitted the Club's constitution (with the handwritten changes) to Silverman and asked her to submit it to the Board. The Board met on February 3, discussed the Bible Club proposal, and resolved to give it "further study and consideration."

By this time, Emily Hsu had been trying to set up a Bible Club for five months and had still received no definitive answer from the Board. On February 16, Emily and her brother Timothy commenced this suit, alleging violations of the Equal Access Act, 20 U.S.C. §§ 4071-4074, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4, the Free Exercise Clause, the Establishment Clause, the Free Speech Clause, the Equal Protection Clause, the Due Process Clause, their rights to free association under the First Amendment, and various provisions of the New York State Constitution. They asked for declaratory relief, unspecified damages, and

preliminary and permanent injunctions that would prohibit the School from denying them "equal access to school facilities" and from violating their constitutional rights.[3]

On March 10, the Board officially recognized the Walking on Water Club on the condition that the Club remove its exclusionary officership policy. In relevant part, the Board's resolution stated:

> Whereas, we are concerned that the formation of a religious club could lead to the feeling on the part of some students that they would be excluded or ostracized if they failed to participate in any organized prayers at such a religious club; and
>
> . . .
>
> Whereas, discrimination by a student club which limits

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[3] We are satisfied that we retain jurisdiction to decide this case notwithstanding Emily Hsu's intervening graduation. Although the suit is moot as to her to the extent that she seeks injunctive relief, *Fox v. Board of Trustees*, 42 F.3d 135, 140 (2d Cir. 1994) (injunctive claims are mooted for university students who graduate because no redress is available), *cert. denied*, 115 S.Ct. 2634 (1995); *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (graduation of university students on women's ice hockey team moots Title IX claim), Timothy Hsu is currently a junior at the School. Jane Shin and Johnny Whang, students who originally joined with Emily in her effort to form the Bible Club, are not named as plaintiffs in the suit, and there is no way to tell from the record whether they remain students at Roslyn High. But at oral argument, counsel for both sides confirmed that there are students--in addition to Timothy Hsu--who currently wish to form the Walking on Water Club as defined by its constitution. We therefore assume this to be the case.

a student's full participation in club activities because of the student's creed or religious beliefs would be detrimental to the education, welfare and well-being of the students attending the District's schools.

Now, therefore, be it resolved that we hereby approve the formation of said high school student Christian religious club on the following conditions:

1. Membership in the Club shall be limited to Roslyn High School students, and no student shall be discriminated against or excluded from participating in or having access to the Club, including without limitation entitlement to be an officer of the Club, on the basis of creed or religion.

2. A Roslyn Faculty member shall be assigned as a monitor to the Club in a non-participatory capacity only.

3. Non-school persons may not direct, conduct, control or regularly attend activities of said Club.

4. The Club shall be allowed to meet on school premises, but only during non- school hours.

5. In accordance with the Federal Equal Access Act, no public funds will be expended to support the Club or its activities beyond the incidental cost of providing meeting space and compensation for a monitor.

> It is hereby further resolved that the Superintendent of Schools is hereby directed to cause all listings, communications and announcements issued by the District pertaining to said Club expressly to state that the Roslyn School District does not endorse the Club, but is mandated by the Federal Equal Access Act to permit the Club's activities, same to be on a voluntary basis and to be held on school premises during non-school hours only.

This qualified recognition forced the Hsus to accept a condition that they consider incompatible with the formation of their club. They believe that forcing the Club to accept the possibility of non-Christian officers "would influence the form and content" of the Club, and might alter the speech at the Club's meetings. Only if the Club's officers are Christian, say the Hsus, will the Club "serve the function we desire for it to serve." Because of their belief that the leadership provision is an integral part of the Club, they did not think it meaningful to form a club based on the School's conditional recognition, and have therefore treated the School's resolution as tantamount to non-recognition. They folded these arguments into an amended complaint, filed March 25.

On May 13, 1994, the district court held a hearing on the plaintiffs' request for a preliminary injunction and the defendants' motion for judgment on the pleadings. On February 21, 1995, the district court issued a thorough opinion denying the request for a preliminary injunction and denying the defendants' motion. 876 F.Supp. 445 (E.D.N.Y. 1995). Rejecting the Hsus' Equal Access Act claim, the court held that

the School "appears to have satisfied its obligation under the Act," *id.* at 456, by letting the Club meet "on the same basis" and "subject to the same terms and conditions" as other clubs. *Id.* at 454. Those "terms and conditions" (that is, the nondiscrimination policy) were reasonable, said the court, because they were "aimed at . . . protecting the well-being of all students by ensuring equal and nondiscriminatory access of all students to student clubs." *Id.* at 455. The court concluded both that the nondiscrimination policy on its face did not violate the Establishment Clause, and that the Establishment Clause required that the nondiscrimination policy be applied to the Walking on Water Club, since an exemption for the Club would create an "unavoidable [ ] risk of excessive entanglement." *Id.* at 460. In addition, the court held that such an exemption would convey "a message of exclusion" and would permit "discrimination based on religion in the school setting." According to the court, this discrimination, like "racial discrimination in education[,] violates a most fundamental national public policy, as well as rights of individuals.' " *Id.* at 459 (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983)). Finally, the court rejected the plaintiffs' free exercise, free speech, and free association claims on the ground that applying the School's nondiscrimination policy to the Club advanced, in the least restrictive manner possible, the School's compelling interest in "ensur[ing] all other students the right to be free from invidious discrimination in school, . . . [since] a school-recognized club that is permitted to discriminate on the basis of religion likely would be disruptive to the educational mission of the school." *Id.* at 462-63.

The plaintiffs appeal the denial of their preliminary injunction motion.[4]

II. Standard of Review

It is "normally appropriate" to review a district court's preliminary injunction decision under a deferential standard, determining whether the district court has abused its discretion, *Thornburgh v. American College*, 476 U.S. 747, 755 (1986), *rev'd on other grounds*, *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992), either by "an error of law," *Blum v. Schlegel*, 18 F.3d 1005, 1010 (2d Cir. 1994) (internal quotations omitted), or by "applying an incorrect legal standard." *Waldman Publishing Corp. v. Landoll, Inc.*, 43 F.3d 775, 780 (2d Cir. 1994). However, the presumption that we review a preliminary injunction decision for "abuse of discretion" is "a rule of orderly judicial administration, not a limit on judicial power." *Thornburgh*, 476 U.S. at 757. The appropriate level of deference afforded to a preliminary injunction decision is "not inflexible." *Id.* at 756. For instance, we held in *Romer v. Green Point Savings Bank*, 27 F.3d 12, 16 (2d Cir. 1994), that preliminary injunction decisions must undergo "greater scrutiny" when they "effectively award victory in the litigation":

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[4] The defendants cross-appeal from the order denying their motion for judgment on the pleadings. However, that order is neither a "final decision" under 28 U.S.C. § 1291 nor an interlocutory order that falls within 28 U.S.C. § 1292. We therefore consider the arguments made on the cross-appeal only to the extent that they bear upon the issues in the main appeal.

> When a district court's order, albeit in the form of a TRO or preliminary injunction, will finally dispose of the matter in dispute, it is not sufficient for the order to be based on a likelihood of success or balance of hardships . . .; the district court's decision must be correct (insofar as possible on what may be an incomplete record), and appellate review should be plenary.

Id. And in *Thornburgh*, the Supreme Court explained why the Third Circuit had been correct to conduct "plenary review" of the district court's denial of a preliminary injunction:

> [I]f a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction.

Id. at 757; *see also Blum*, 18 F.3d at 1010 ("abuse of discretion" standard applies "[w]here the facts are of controlling relevance"). Judge Friendly offered a similar explanation in applying "a broad standard of review" in *Donovan v. Bierwirth*, 680 F.2d 263, 270 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982):

> There is no real dispute over what did and what did not occur. The quarrel is over the legal standard and its application to facts not seriously in dispute . . . . We would ill perform our duties by a decision affirming the district court because of limitations on the scope of

review. . . .

See also Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 777-78 (1982).

As these cases make clear, deferential review is justified by the circumstances ordinarily accompanying preliminary injunction rulings: expedited proceedings and untested facts produce tentative rulings with provisional consequences, allowing room for a different ultimate outcome. However, when these circumstances are absent and the district court ruling resembles a final decision on the merits, there is less justification for substantial deference. We therefore consider the nature of the district court's ruling.

Presented with a preliminary injunction motion, the district court (naturally) decided the substantive issues in that framework. Its decision, however, resembles more closely a grant of summary judgment to the defendants. First, as in *Thornburgh* and *Donovan*, "the facts [we]re established," and the only dispute was over the correct legal standard to apply. There is no sign that the factual record needs development or that factual disputes need resolution before the merits of the plaintiffs' claims can be finally decided. The district court expressed no such need at the two-day hearing or in its opinion, and the parties expressed no such need, then or after.

Second, there is no indication that the district court's consideration of this case was abbreviated by any perceived time constraint, as is common in a preliminary injunction proceeding. The plaintiffs' amended complaint was filed in

March 1993, the hearing was held two months later, and the request for "preliminary" injunctive relief was denied in February 1994, eleven months later. At that point, Emily Hsu had been a graduate of Roslyn High for eight months, and Timothy Hsu was well into his sophomore year.

Third, the purpose of the preliminary injunction motion was not the ordinary goal of "preserv[ing] the relative positions of the parties." *Thornburgh*, 476 U.S. at 755. The preliminary injunction motion sought an order requiring the School to recognize the Walking on Water Club on its terms, thus altering the status quo. Moreover, the injunction was likely to give these plaintiffs the only opportunity that the courts could likely afford for them to participate in the Club.

In these ways, the district court's decision, explained by a decisive and categorical opinion, resembled a definitive ruling on the merits of the plaintiffs' claims.[5] As in *Romer*, the

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[5] Although the district court concluded each section of its analysis with language appropriate to the disposition of a preliminary injunction motion, 876 F.Supp. at 456 ("Accordingly, plaintiffs have failed to demonstrate a likelihood of success or sufficiently serious questions . . . ."); *id.* at 463 (same), its opinion actually rejects all of the plaintiffs' federal claims on the merits after giving them extensive consideration. *Id.* at 454 ("Providing access to the bible club on the same basis as all other noncurriculum-related student clubs amounts to 'equal access.' "); *id.* at 460 ("the Establishment Clause is not violated"); id. at 462 (the Free Exercise Clause and RFRA "do[ ] not mandate" that the School recognize the Club); *id.* (the Free Speech Clause claim is "of doubtful merit"); *id.* at 462 n. 21 (the equal protection and due process claims "have little merit"); id. at 463 (the plaintiffs' free association rights were not violated). Thus, even though the district court ended its opinion by denying the defendants' motion for judgment on the pleadings, "without prejudice to their right to move for summary judgment following discovery," 876 F.Supp. at 463, the future

district court's decision "effectively award[ed] victory in the litigation." And as in *Thornburgh* and *Donovan*, the district court's resolution of the case hinged not on what the facts were--since the material ones are undisputed--but on how the law should be applied. As a result, our review of the district court's denial of a preliminary injunction is plenary.

III. The Hsus' Rights

A preliminary injunction is granted if the party seeking the relief establishes two elements: first, the party will suffer "irreparable harm" if the injunction is denied; second, either the moving party is likely to succeed on the merits, or there are "sufficiently serious questions going to the merits" and the "balance of hardships tip[s] decidedly" its way. *Resolution Trust Corp. v. Elman*, 949 F.2d 624, 626 (2d Cir. 1991). The district court ruled that the Hsus would carry their burden as to the first element if the School denied them their First Amendment rights:

> If, as plaintiffs contend, they are being deprived of their First Amendment rights by defendants' nondiscrimination policy, they have and will continue to sustain irreparable harm. As the Supreme Court has stated: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, [427 U.S. 347, 373 (1976)] . . . . Accordingly, this Court finds that plaintiffs have demonstrated that they will

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summary judgment motion would have been little more than a formality.

suffer irreparable harm.

876 F.Supp. at 451. The district court's finding of irreparable harm was thus conditioned on the conclusion (ultimately rejected by the district court) that the Hsus were being deprived of free speech rights. Since the irreparable harm inquiry depends on the merits of the claims, we turn to the merits, asking whether the Hsus are "likely to succeed," and consider irreparable injury at the end of our opinion.

The Hsus make two statutory and several constitutional claims. Consistent with our practice of avoiding constitutional questions wherever possible, we begin with the Hsus' statutory claims. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985) (it is "a fundamental rule of judicial restraint" that "[p]rior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision" (internal quotations omitted)); *Montilla v. INS*, 926 F.2d 162, 168-69 (2d Cir. 1991) (same).

A. *Equal Access Act: Generally*

Enacted in 1984, the Equal Access Act ("Act"), 20 U.S.C. §§ 4071-4074, guarantees the right of public school students to form extracurricular groups that engage in religious, philosophical, or political discourse. Section 4071(a) creates this statutory free speech right[6]:

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[6] Whether this right falls within or without the scope of the First Amendment is a question explicitly left unanswered by the Supreme Court. *See Board of Educ. v. Mergens*, 496 U.S. 226, 247 (1990).

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

There is no doubt that Roslyn High School is a "public secondary school" that has a "limited open forum"[7] and receives federal funds. Thus, the Hsus' claim turns on whether the School denied them "equal access . . . on the basis of the religious ... content of the speech" that would have taken place at their meetings.[8]

There is scant authority to guide us in our effort to interpret these statutory terms. The legislative history of the

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[7] A school has a "limited open forum" if it "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b).

[8] The Hsus' argument on the Equal Access Act (and the defendants' response) focuses almost exclusively on the denial of "equal access." Section 4071(a) of the Act also creates a cause of action when a school denies "a fair opportunity" to students who wish to conduct certain meetings, or "discriminate[s] against" these students. Following the parties' lead, we limit our discussion to the term "equal access" and draw no conclusions about the other two terms.

Act[9] indicates that its authors sought to end discrimination against religious extracurricular groups in public schools by mandating a policy of neutrality. *See* 130 Cong. Rec. 19,224 (1984) (statement of Sen. Hatfield). To the Act's authors, "equal access" meant that "secondary school students engaging in religious speech have *the same rights* to associate together and to speak as do students who wish to meet to discuss chess, politics, or philosophy." *Id.* at 19,216 (Sen. Denton) (emphasis added).

Supporting and opposing members of Congress worried that this grant of protection for student speech was too broad and the intrusion on school autonomy too great; specifically, they expressed concern that a law intended to ensure that after-school prayer groups could meet would leave a school powerless to bar the Ku Klux Klan, cults, or intrusive proselytizers.[10] Though Senator Hatfield, the Senate's primary

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[9] After the bill that became the Equal Access Act passed the House and was reported out of committee in the Senate, it was extensively rewritten. The committee reports are therefore unilluminating. *Mergens*, 496 U.S. at 238; Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 37 (1986). *See* S. Rep. No. 151, 98th Cong., 1st Sess. (1983) and S. Rep. No. 357, 98th Cong. 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 2306 and 2348, respectively. Congress debated the final version of the bill on June 27 and July 25, 1984.

[10] *See* 130 Cong. Rec. at 19,224 (Sen. Gorton) ("I am convinced that the limited open forum . . . clearly covers the Ku Klux Klan . . . ."); *id.* at 19,229 (Sen. Danforth) ("[The Act] make[s] it clear that the school administration does have, does continue to have inherent power to

sponsor, thought this concern was overstated, arguing that the Act still allowed schools to outlaw groups that "would be disruptive to the purpose of [the] school . . . [, including a group like] the American Nazi Party . . . that is dedicated to the purpose of dividing people, on grounds of race or religion," *id.* at 19,224, he admitted that "we are [not] going to be able to anticipate every possible instance that will arise under this expansion of rights . . . ." *Id.* at 19,225.[11] Indeed, the members of Congress do not appear to have anticipated the situation that confronts us: there is no discussion in the legislative history about whether "equal access" allows an after-school religious club to limit its leaders to those of a particular religious faith. Nor did members of Congress discuss whether the term "speech at [the] meetings" includes a leadership eligibility requirement that is intended to guarantee that the speech at the club meetings will have a particular content.

Though the Supreme Court interpreted the Equal Access Act in *Board of Educ. v. Mergens*, 496 U.S. 226 (1990), that case also provides only limited guidance about how to

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prevent the unrestrained, intensive, extreme psychological pressure which could be utilized by some religious groups to attempt to bring other kids within the religious community."); *id.* at 20,938 (Rep. Kastenmeier) ("I--and school administrators--are concerned that groups such as the Ku Klux Klan or the Nazis may for the first time be able to claim access to secondary schools.").

[11] *See also* 130 Cong. Rec. at 19,225 (Sen. Hatfield) ("I am willing to take my risk on the expansion of freedom and rights [rather] than trying to nail them down so specifically, so tightly, that we foreclose the necessity of the court interpreting them in the long run anyway or making sure that some particular momentary problem that we foresee is taken care of.").

interpret the statutory terms that concern us. In *Mergens*, students at a Nebraska public high school wanted to form an after-school Christian club, open to students of all religions, for prayer and Bible discussion. *Id.* at 232. The students sought the school's official recognition, which would have given the club "access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair." *Id.* at 247. The students' proposal contemplated that there would be no faculty adviser. *Id.* at 232. *See* 20 U.S.C. §§ 4071(c)(2) & 4072(2). The school denied recognition on the grounds that every recognized club needed a faculty sponsor, and that recognition of a religious club would violate the Establishment Clause. *Mergens*, 496 U.S. at 232-33.

The Supreme Court held that the Equal Access Act required recognition of the club, and that the Act on its face and as applied did not violate the Establishment Clause. (We address the Establishment Clause aspect of the Court's decision in section IV, *infra*.) In discussing whether the school's refusal to recognize the Bible club fell within the terms of the statute, the Court concerned itself almost exclusively with the meaning of the term "noncurriculum related student groups," a concept not at issue in our case.[12] The final paragraph of the Court's statutory interpretation section briefly discussed the term "equal access," holding simply that to deny the Bible Club

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[12] The school argued that all 30 of its official extracurricular groups, including the Chess Club and "Subsurfers," were "curriculum related." The Court disagreed, and held that the school therefore maintained a "limited open forum" under the statute. *Mergens*, 496 U.S. at 243-46.

"official recognition" (including denial of access to the school newspaper, bulletin boards, and public address system) was to deny it "equal access." *Id.* at 247.

This Court has had no occasion to consider the Equal Access Act. Two other circuits have interpreted the Act, *see Ceniceros v. Board of Trustees*, 66 F.3d 1535 (9th Cir. 1995); *Garnett v. Renton School Dist. No. 403*, 987 F.2d 641 (9th Cir.), *cert. denied*, 114 S.Ct. 72 (1993); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3d Cir. 1993); *Student Coalition for Peace v. Lower Merion School Dist.*, 776 F.2d 431 (3d Cir. 1985), but none of these cases addresses the situation presented here or construes the wordings that concern us. In interpreting the Act, we therefore rely on the common meanings of the words themselves, the logic and architecture of the Act, the congressional purpose of providing religious clubs with the "same rights" as other clubs, the Supreme Court's direction in *Mergens* that the Act is to be "interpreted broadly," 496 U.S. at 239, and Supreme Court cases from analogous areas of the law.

B. *"[R]eligious ... content of the speech ...".*

Did the School refuse to recognize the Hsus' club "on the basis of the religious . . . content of the speech at [the Club's] meetings"? One might argue that there is no "speech" at issue here. After all, the School did not base its qualified recognition of the Club on what would be said at the Club meetings, but on what could be characterized as the Club's "act" of excluding non-Christians from leadership. The School has demonstrated that it would recognize the Walking on Water

Club (or any other religious club) without regard to the content of the club's prayers or discussions, so long as no religious exclusions were made.

We are therefore confronted with difficult issues about the meaning of the statutory term "speech." We conclude that, in light of the Supreme Court's command that we construe the Act broadly, the term "speech" includes the Walking on Water's Club leadership policy provision, to the extent that it is reasonably designed to assure that a certain type of religious speech will take place at the Club's meetings.[13] We take guidance from the Supreme Court's recent decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338 (1995). In that case, the Court recognized that the message a group imparts sometimes depends upon its ability to exclude certain people, and that this exclusion may be protected by the First Amendment. The veterans group that organized the annual St. Patrick's Day parade in Boston refused to let an Irish gay pride group march with a gay pride banner. The Massachusetts courts held that this exclusion ran afoul of the state's public accommodations law, which prohibited discrimination on the basis of, *inter alia*, sexual orientation. *Id.*

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[13] Certainly, the exclusion resembles conduct in at least one sense, since non-Christians are barred from running for leadership positions. But speech that has concrete effects is not automatically converted into nonexpressive conduct. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). And, of course, conduct that is expressive can receive the same protection as "pure speech." *See, e.g., Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 505 (1969) (public school students wearing black armbands to protest Vietnam War receive protection under the Free Speech Clause).

at 2341-43. The Supreme Court reversed, holding that this application of the state law violated the parade organizers' First Amendment free speech rights. *Id.* at 2343. The Court noted that the parade did not exclude gay people in general, but rather excluded a group of gay people that wanted to communicate a particular message during the parade. By excluding that group, the parade organizers sought to "tailor" their own message by omitting a particular communication from the banners that constituted their speech, *id.* at 2347, and by "select[ing] the expressive units of the parade from potential participants."[14] *Id.* at 2348. The lesson we draw from Hurley is that the principle of "speaker's autonomy" gives a speaker the right, in some circumstances, to prevent certain groups from contributing to the speaker's speech, if the groups' contribution would alter the speaker's message.

Hurley does not control this case, because (first) it concerns speech rights under the Constitution, not a federal statute, and (second) the Club's proposed exclusion differs somewhat from the exclusion at issue in *Hurley*. Here, we are not faced with the exclusion of a discrete group that will definitely communicate a specific message if included. Rather, a broad cross-section of people is excluded from leadership in the Club because they lack a personal characteristic or belief, without any showing that they would desire to communicate any particular message.

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[14] In the past, the parade organizers had also excluded the Ku Klux Klan and an anti-busing group. *Hurley*, at 115 S.Ct. at 2342.

Despite these two differences, *Hurley* remains instructive. First, since the Act creates an analog[15] to the First Amendment's default rule banning content-based speech discrimination, cases discussing the meaning of "speech" in First Amendment jurisprudence are also interpretive tools for understanding the Act. Second, the exclusions here and in *Hurley* are too similar to be meaningfully distinguished. As in *Hurley*, the Club's decision to exclude is based on its desire to preserve the content of its message. The Hsus claim that having Christian leaders necessarily shapes the content of the religious speech at their meetings, because the nature and quality of the speech at the meetings is dependent upon the religious commitment of the officers. We can accept this claim to the extent that there is an integral connection between the exclusionary leadership policy and the "religious speech" at their meetings. No party or *amicus* is challenging the idea that the activities of this Club will consist of "religious speech." We accept--as the parties and the district court have apparently accepted--that the purpose of the Club is to organize participation in activities that will be in the nature of religious devotions.

However, as we review the Club's constitution, we see that some of the activities are not unambiguously "religious." Although meetings will consist mostly of prayers, "singspiration" (a form of musical prayer), Bible readings, and testimonies about the impact of Jesus Christ in the students' lives, the Club's constitution also lists guest speakers, skits, and

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15 *See supra* note 6 and accompanying text.

games as possible activities at the meetings.[16] There is no reason to limit the range of activities that may be undertaken by an after-school religious club that discriminates, so long as the activities are integral to a sectarian religious experience. But to the extent that such a group engages in social and community activities that are not integral to a sectarian religious experience, it is in danger of becoming merely a religious affinity group practicing social exclusion. The entire thrust of the Hsus' case, the School's resistance, and the amici's arguments assumes that the activities at the Club's meetings promote and express the Christian religious experience in an integral way, and we proceed on this assumption.

On the other hand, the constitution also lists picnics and volunteer community service as Club activities, events which would obviously take place outside of the Club's meetings at the schoolhouse. Taking an expansive view, one can say that religion suffuses all the conduct of a pious person, so that the worshipful contemplation of nature on a picnic, as well as acts of charity and service, may all be deemed to have a religious dimension. However, this is not "religious speech" within the meaning of the Equal Access Act, if only because it will not occur at a "meeting." In addition, there is no reason to believe, based on the present record, that the planning of a picnic or a service project must be done by a Christian in order to make it meaningful for Christian students. In the Walking on Water Club, the planning of these non- school activities is the only

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[16] We note that under the Act, "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups." 20 U.S.C. § 4071(c)(5). This would therefore prohibit the Club's "guest speakers" from acting as substitute prayer leaders.

responsibility of the Activities Coordinator, who, according to the Hsus, must ensure that the activities do not "offend Christian sensibilities." But an agnostic with an understanding of "Christian sensibilities" might plan these activities as well as any other student. Similarly, it is very difficult to understand why the "religious speech" at the Walking on Water Club meetings would be affected by having a non-Christian "Secretary," whose principal duties are "to accurately record the minutes of meetings and be involved in the Club's financial accounting and reporting."

The Hsus claim that all officers, including the Secretary and Activities Coordinator, must be prepared to "open or close a meeting with prayer . . . or to lead a Bible study" and that this duty justifies the exclusion of non- Christians from those posts. But this assertion has no limiting principle. Anyone in attendance at a religious meeting may be called upon for a benediction or to "lead a Bible study." There is thus no difference between (a) the Hsus' desire to discriminate in the selection of numerous officers of a small club, each of whom may be called upon to officiate briefly, and (b) a religious test for membership or attendance, which is plainly insupportable.[17]

The leadership provision is defensible, however, as to the President, Vice-President, and Music Coordinator of the Club, because their duties consist of leading Christian prayers and devotions and safeguarding the "spiritual content" of the

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[17] It is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech.

meetings. Guaranteeing that these officers will be dedicated Christians assures that the Club's programs, in which any student is of course free to participate, will be imbued with certain qualities of commitment and spirituality. Thus, we conclude that the decision to allow only Christians to be President, Vice-President, or Music Coordinator is calculated to make a certain type of speech possible, and will affect the "religious . . . content of the speech at [the] meetings," within the meaning of the Equal Access Act.[18] From this point on, our reference to the Club's exclusionary leadership policy refers only to the exclusion of non-Christians from these three leadership positions.

In interpreting the term "speech," we are also guided by a set of Supreme Court cases similar to *Hurley*, although analyzed under the Court's freedom of association jurisprudence. The right to free association for expressive purposes is implicit in the First Amendment free speech guarantee. *See NAACP v. Alabama ex. rel. Patterson*, 357 U.S.

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[18] These distinctions, which are not easy for anyone to draw (whether federal judges or school principals), spring necessarily from Congress's use of the undefined term "religious speech." But even without the Equal Access Act, courts would still be required to determine the contours of the term "religion." For instance, the First Amendment's command that the state may not "prohibit[ ] the free exercise [of religion]" requires us to ask whether a belief is "religious" and "sincerely held." We do not hold that this division between Activities Coordinator and Secretary on the one hand, and President, Vice-President, and Music Coordinator on the other, is the only decision that school administrators could have made to avoid being reversed by the courts. Rather, taking as our baseline the District's decision to prohibit the Club from applying its leadership provision to any of its officers, we have asked what the Hsus' minimum entitlement is under the Equal Access Act, based on this factual record.

449, 460-61 (1958); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977). That right is an instrumental one: expressive association is protected "as an indispensable means of preserving other individual liberties." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). The right to associate also includes the right not to associate. *Id.* at 623.

The Supreme Court examined the scope of this right in *Roberts* and *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). In both cases, the Court upheld the application of state antidiscrimination laws to private civic clubs that wished to continue their exclusion of women as members. Although the Court determined that the statutes infringed on the expressive association rights of the private clubs, "that infringement [was] justified because it serves the State's compelling interest in eliminating discrimination against women." *Rotary*, 481 U.S. at 549. *See also Roberts*, 468 U.S. at 623; *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11-12 (1988) (rejecting a facial challenge to a nondiscrimination statute, on the ground that the freedom of expressive association was not infringed upon by all applications of the statute).

Roberts and *Rotary* (like *Hurley*) are analytically distinct from this case, because they involve constitutional rights, not statutory ones. Nevertheless (like *Hurley*) they assist our interpretation of the term "speech" in the Equal Access Act. The Act, which protects students only against the denial of equal access on the basis of their "speech," does not expressly protect their right to "associate." But since the grant of speech protection is to "students who wish to conduct a

meeting," the right to associate for the purpose of holding such a meeting is a necessary corollary. The Act's authors made it clear that the language of § 4071(a) was intended to protect both free speech and free association rights of certain student clubs. 130 Cong. Rec. 19,216 (1984) (statement of Sen. Denton); *id.* at 19,217 (Sen. Hatfield). Thus, the Act contains an implicit right of expressive association when the goal of that association is to meet for a purpose protected by the Act.

As in *Roberts* and *Rotary*, when the students' desire to hold a meeting covered by the Act involves a decision not to associate with other students, that decision, depending on its purpose, may constitute an exercise of the students' right of expressive association. On the one hand, an exclusion solely for reasons of hostility or cliquishness, with no direct bearing or effect on the group's speech, does not implicate the right to expressive association. But expressive association is implicated when the decision to exclude is made in order to foster the group's shared interest in particular speech. *See* William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 78-80, 90-91 (1986). As the Court said in *Roberts*, a regulation that prevents a group from excluding certain people "may impair the ability of the original members to express only those views that brought them together." 468 U.S. at 623 (emphasis added). Similarly, the Court in *New York State Club Association* stated that

> an association might be able to show that it is organized for specific expressive purposes and that it *will not be able to advocate its desired viewpoints nearly as effectively* if it cannot confine its membership to those

> who share the same sex, for example, or the same religion.

487 U.S. at 13 (emphasis added).

It is undisputed that the decision by the Walking on Water Club to impose a religious test for leadership positions has been made purely for expressive purposes--to guarantee that meetings include the desired worship and observance--rather than for the sake of exclusion itself. As we have explained, *supra*, this test serves this expressive purpose for three of the leadership positions. As in other instances in which a limitation on the right to associate for expressive purposes has been held to infringe on the right to free speech, the School's refusal to allow the Walking on Water Club to guarantee that Christians will lead its Christian prayers implicates free speech rights under the Act. This does not mean, however, that the students' Equal Access Act claim automatically prevails. On the constitutional level, the right to free association is not absolute. *Roberts* and *Rotary* make clear that a "compelling" governmental interest (such as eliminating discrimination against women) will override the right to expressive association. *Roberts*, 468 U.S. at 623; *Rotary*, 481 U.S. at 549. And, since the students' right to expressive association here is based on a statute applicable to public schools--where free speech rights receive somewhat less protection generally-- it is not at all apparent that a governmental interest need be "compelling" to override the expressive association rights at issue here. We ask in sections IV and V, *infra*, whether the School has a valid reason (under the Constitution or otherwise) for denying the Club the

recognition it seeks. We can conclude at this point, however, that when an after-school religious club excludes people of other religions from conducting its meetings, and when that choice is made to protect the expressive content of the meetings, a school's decision to deny recognition to the club because of the exclusion is a decision based on "the content of the speech at [the] meetings," within the meaning of the Eqal Access Act.

C. "*[E]qual access*".

The District argues that "equal access" has not been denied. It claims that it is applying its nondiscrimination policy neutrally to all after-school clubs, that this equal treatment amounts to "equal access," and that recognition of the Walking on Water Club, with its discriminatory constitution, would afford the Club special treatment, a level of accommodation that the Act does not demand.

The District's focus on the even application of its nondiscrimination rule misses the point. The Act mandates that students be given "equal access," not that the School's internal rules be administered uniformly. A rule against wearing hats in the school building, perfectly and consistently enforced, might deprive Jewish students of equal access to after-school facilities for shared religious observance. Similarly, a rule requiring students to wear appropriate footwear at all times, perfectly and consistently enforced, might effectively ban after-school meetings of the Yoga Club. The neutral application of the School's rules allows the School to say that it is treating all clubs equally. But exemptions from neutrally

applicable rules that impede one or another club from expressing the beliefs that it was formed to express, may be required if a school is to provide "equal access."

The District argues that allowing the Hsus to discriminate on the basis of religion would grant them special rights: since the Chess Club may not limit its officers to Muslims, even if its founding members trust only Muslims to lead them, then the Walking on Water Club may not limit its officers to Christians. We agree that the Hsus are only entitled to the same rights that other student clubs have. But the District's argument ignores the fact that the Walking on Water Club is a religious club and the Chess Club is not. Walking on Water Club meetings will include certain types of religious prayers and songs. The Club's leadership eligibility requirement on the basis of religion is therefore similar to a chess club's eligibility requirement based on chess. Though the District argues that only those exclusions based on "ability and performance" are appropriate, this ignores one of the principal ways in which many extracurricular clubs typically define themselves: by requiring that their leaders show a firm commitment to the club's cause. The record does not include the constitutions of other extracurricular clubs at Roslyn High School,[19] but it would be sensible--and unremarkable in light

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[19] The complaint lists 35 extracurricular clubs granted recognition by the School: American Field Service; Art Club; Astronomy Club; Band; Chamber Singers; Chess Club; Chorus; Computer Club; Fashion Club; Forensics; French Club; Freshman Orientation; Harbor Hill Light (the yearbook); Hilltop Beacon (the newspaper); Human Relations Club; International Ambassadors Club; Jazz Band; Key Club; Math Club; Mock Trial; Model Congress; National Honor Society; Organization of Class Councils; Peer Counseling; Roslyn Athletics Club; Roslyn Singers;

of the clubs' particular purposes--for the Students Protecting the Environment Against Contamination Club to require that officers have a demonstrated commitment to conservation or recycling; for Students Against Drunk Driving to require that officers have taken the pledge; or for Students for Social Responsibility to require that officers have a social conscience. Similarly, a hypothetical school scouting club could preserve its character and values by requiring that officers be exemplars of the scouting movement, just as a hypothetical Marxist discussion group could require that officers be dedicated to socialist values or be card-carriers.

All of these "tests" of an officer's commitment to the group's cause allow the group to ensure that its agenda will be advanced at its meetings. One can expect that students in favor of contaminating the environment will lead different meetings than those against contamination, for instance. Similarly, the Hsus may reasonably expect that the prayers at a Club meeting led by non-Christians would be different than the prayers led by Christians. Seen in this light, the discrimination practiced by the Walking on Water Club merely requires that its officers have a certain level of commitment to the program and purpose of the Club. Because that program and purpose are religious and sectarian, the requisite level of commitment and belief is

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Royal Crown Players; Science Olympiad; Spanish Club; Student Prints (a literary magazine); Students Against Drunk Driving; Students for Social Responsibility; Students Protecting the Environment Against Contamination; Students for the Ethical Treatment of Animals; and Volunteers for the Education of Retarded Youths.

quite naturally expressed in terms of religious belief.[20] Equal treatment should mean that the Walking on Water Club enjoys the same latitude that other clubs may have in determining who is qualified to lead the Club. Thus, just as a secular club may protect its character by restricting eligibility for leadership to those who show themselves committed to the cause, the Hsus may protect their ability to hold Christian Bible meetings by including the leadership provision in the club's constitution.

This type of commitment requirement may be especially important to religious clubs. The Equal Access Act provides that "employees or agents of the school . . . [may be] present at religious meetings only in a nonparticipatory capacity." 20 U.S.C. § 4071(c)(3). Though the Act provides protection for political and philosophical clubs as well as religious clubs, this provision of the Act singles out religious clubs, denying only to them the opportunity to have faculty sponsors (presumably because of Establishment Clause concerns). Thus, while political clubs and chess clubs may have faculty sponsors to promote institutional stability, help guarantee that new leaders are committed to the club's cause,

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[20] A religious-based exclusion would have different meanings in different groups. A hypothetical chess club that excluded Muslims could not claim that the exclusion was necessary to guarantee committed chess players. The Hsus' insistence on the exclusion of non-Christians from leadership positions, however, is not a matter of prejudice or clique, just as the girls soccer team at Roslyn High probably does not exclude boys out of enmity. The exclusion in both instances serves a legitimate self- definitional goal for the group. This essential and direct link between the legitimate purpose of the club and the principle of exclusion necessary to achieve that purpose distinguishes the girls soccer team and the Walking on Water Club from the hypothetical Chess Club.

and ensure that the club remains true to its purpose, religious clubs do not have that protection. It is therefore particularly understandable that a religious group would seek to assure in other ways that its leadership is genuinely committed to its cause.

The District argues that its nondiscrimination policy does not in any way hamper the ability of Club members to express their religious beliefs. After all, says the District, the nondiscrimination policy "does not require that a 'non-Christian' lead the club. [Club] members are free to elect whomever they believe will be the best leader and may cast their vote according to their conscience." The district court took a similar view, suggesting that the School's nondiscrimination policy did not actually prevent the Hsus from forming a club with Christian leaders, because the Club could rely on "[e]lective forces" to make sure that its desired leaders were chosen.[21] 876 F.Supp. at 455. The Hsus' concern that the Club "risk[ed] facing 'non- Christian leadership' " and might be "taken over" by students inimical to the Club's purpose was dismissed by the court as "speculation." *Id.* at 456. But of course, it is also speculation at this point to conclude that there would be no hostility toward a Christian Bible Club at Roslyn High. We simply do not know. And considering that (i) the Club may not have a faculty sponsor and (ii) religious groups have historically been the object of

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[21] The court did not definitively pass on the issue of whether the School's nondiscrimination policy "inhibit[ed] or prevent[ed] the bible club's members from selecting those students they desire to lead the club," although it held that this restriction on the Club's freedom would not be "impermissibl[e]." 876 F.Supp. at 455.

hostility and persecution more often than, say, chess players or glee clubs, the Hsus' concern that their effort to pray and discuss the Bible after school might be disrupted, though speculative, is by no means unreasonable. In any event, it is not disputed that this concern has been enough to chill their speech.

More importantly, telling the Club to rely on elections to assure that its leaders are Christians contemplates that the Club will engage in the same type of religious discrimination embodied in the Club's constitution. The School cannot have it both ways. If it insists on outlawing all religious discrimination, including clubs with discriminatory constitutions, it can scarcely recognize clubs that elect officers on the basis of their religion. But since the whole purpose of the Club is to gather for sectarian praise and worship (as the School and district court have recognized), the need for the Hsus to realize that purpose justifies the imposition of a religious test for the leaders of the after-school meetings. Thus, the School's complete ban on "religious discrimination," however it is enforced, also bans the Bible club envisioned by the Hsus.

We therefore reject the District's argument that the Hsus could abandon the leadership provision of the Club's constitution without suffering any tangible harm. Under the Equal Access Act, the Hsus may try to preserve the content of the religious speech at their meetings by discriminating in a way that ensures that the Club's leaders will be committed to both its cause and a particular type of expression. The School's recognition of the Club only on the condition that it abandon

this effort therefore constitutes a failure to provide equal treatment, and denies the Walking on Water Club "equal access." In short, the Hsus are likely to succeed on their claim that Roslyn High violated § 4071(a) of the Equal Access Act, to the extent that the Club's leadership provision applies to the President, Vice-President, and Music Coordinator of the Club.[22]

By concluding that the School's non-recognition denies the Hsus "equal access," we are giving the term "equal access" the broad construction that the Supreme Court requires. *See Mergens*, 496 U.S. at 239. This does not mean, however, that all efforts by a student club to exclude other students are protected by the statute, even if the exclusion is based on a club's desire to realize its expressive purpose. The Equal Access Act is not a set of federal handcuffs fitted to school principals. Schools must have rules to control their students, and rules will always have the effect of suppressing someone's idea for a club. Though the School's effort to apply its nondiscrimination rule is trumped by the Equal Access Act, the Act's mandate of equal access can be trumped by the School's responsibility for upholding the Constitution, for protecting the rights of other students, and for maintaining "appropriate discipline in the operation of the school." *See Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 509 (1969) (internal quotations omitted). These are substantial limitations on the statute's intrusive power. We turn to them now and ask whether this application of the statute is both

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[22] For the reasons that we reject the Hsus' Equal Access Act claim with regard to the Secretary and Activities Coordinator, we also reject their RFRA, Free Exercise Clause, Free Speech Clause, and other constitutional claims with regard to these two officers.

constitutional and consistent with a public school's mission.

IV. The Establishment Clause

The School, with support from the Anti-Defamation League as amicus curiae, claims that exempting the Walking on Water Club from its nondiscrimination policy would violate the Establishment Clause by conferring upon a Christian club a benefit that other clubs do not enjoy. This exemption would violate all three prongs of the so-called "*Lemon* test," runs the argument, because the exemption would have no secular purpose, would have the primary effect of advancing religion, and would excessively entangle the School in religious matters. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). The School also claims that providing the Club with an exemption would "encourage and pressure" students to join the Club and become practicing Christians. The Anti-Defamation League argues principally that the exemption constitutes "an endorsement" of the Club by the School, and creates a "symbolic union" between the two.

Most of the arguments advanced by the School and the Anti-Defamation League are answered in two opinions of the Supreme Court: *Mergens*, and *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). In *Mergens*, the Supreme Court held that the Equal Access Act does not violate the Establishment Clause. Writing for four justices, Justice O'Connor applied the "*Lemon* test," and concluded that the Act

satisfied all three requirements.[23] First, the plurality quickly concluded that the Act had a secular purpose:

> Congress' avowed purpose--to prevent discrimination against religious and other types of speech--is undeniably secular. *See* [*Amos*, 483 U.S. at 335-36] . . . . Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to endorse or disapprove of religion.

Id. at 249 (internal quotations omitted). Second, the Act did not have the primary effect of advancing religion. Rejecting the school's arguments that religion is advanced when club meetings are "held under school aegis" at a place where "compulsory attendance laws . . . provide a ready-made audience for student evangelists," *id.*, the plurality concluded that there was no "symbolic link" between the school and religion:

> [T]here is a crucial difference between *government*

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[23] The only portion of Justice O'Connor's opinion in *Mergens* that did not attract a majority was the section concerning the Establishment Clause. Justice Marshall, concurring separately with Justice Brennan, agreed with Justice O'Connor's Establishment Clause analysis, 496 U.S. at 263, stressing however that the school could avoid an Establishment Clause violation only if it "fully disassociate[d] itself from the club's religious speech and avoid[ed] appearing to sponsor or endorse the club's goals." *Id.* at 270. Justice Kennedy, concurring separately with Justice Scalia, concluded that the Equal Access Act did not violate the Establishment Clause because it did not result in the provision of "direct benefits to religion," and because there was no "coercion" to participate in a religious club. *Id.* at 260- 61.

> speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. *Cf.* [*Tinker*] . . . .
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> . . .
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> To be sure, the possibility of *student* peer pressure remains, but there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate . . . . To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.

Id. at 250, 251 (citation omitted). Finally, the plurality concluded that there was no "excessive entanglement" between the school and the religious club, because § 4071(c) of the Act prohibited the school from sponsoring or being involved in any way with the club's meetings. *Id.* at 253.

In *Amos*, the Court rejected Establishment and Equal Protection Clause challenges[24] to § 702 of the Civil Rights Act

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[24] We discuss the Court's Equal Protection Clause holding in section V.A., *infra*.

of 1964, which exempts religious organizations from the Act's ban on religious discrimination in employment. Again, the Court applied the three-prong "*Lemon* test." First, in examining whether § 702 meets the secular purpose requirement, the Court explained that the requirement

> does not mean that the law's purpose must be unrelated to religion . . . . Rather, *Lemon* 's "purpose" requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.

483 U.S. at 335. The Court concluded that § 702 had a secular purpose because it was motivated by the desire "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335-36. In its discussion of the test's second prong, the Court again stressed that a law conferring direct benefits only on religious groups does not necessarily have the primary effect of advancing religion. Pointing out that it had upheld a number of laws that helped religious groups "advance their purposes," such as a property tax exemption for religious groups, *id.* at 336, the Court explained:

> A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose . . . . [I]t must be fair to say that the *government itself* has advanced religion through its own activities and influence.

Id. at 337; *see also id.* at 338 ("[T]he Court . . . has never indicated that statutes that give special consideration to religious groups are per se invalid."). The Court held that § 702 did not advance religion, rejecting the district court's contrary finding that "the exemption would permit churches with financial resources impermissibly to extend their influence and propagate their faith by entering the commercial, profit-making world." *Id.* at 337. Finally, the Court dismissed concerns regarding excessive entanglement, stating that § 702 actually "effectuates a more complete separation" of religion and the government. *Id.* at 339.[25]

Applying the lines of analysis adopted by the Court in these two cases,[26] we conclude that the School's recognition of

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[25] Parallelling *Mergens*, the Court in *Amos* explicitly reserved the question of whether the accommodation embodied in § 702 was required by the First Amendment. 483 U.S. at 339 n. 17.

[26] The *Lemon* test is quite evidently an endangered doctrine. *See Rosenberger v. University of Va.*, 115 S.Ct. 2510 (1995) (not mentioning *Lemon*); *Board of Educ. of Kiryas Joel v. Grumet*,114 S.Ct. 2481, 2494-95 (1994) (Blackmun, J., concurring) (majority's analysis, while not mentioning *Lemon*, is based on cases which based their analysis on *Lemon*); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (not mentioning *Lemon*); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 395 n. 7 (1993) ("[T]here is a proper way to inter an established decision and *Lemon* . . . has not been overruled."); *id.* at 2149-50 (Scalia, J., dissenting) ("*Lemon* stalks our Establishment Clause jurisprudence once again."). Nevertheless, we follow the three-prong framework used by the Court in *Mergens* (the only case in which the Court has discussed the Establishment Clause implications of the Equal Access Act), although we note that the critical factor in the first two prongs of the test in *Mergens* was whether the School's actions constituted an "endorsement" of the Bible club. *See Rosenberger*, 115 S.Ct. at 2525 (O'Connor, J., concurring) (" 'the message [must be] one of neutrality rather

the Walking on Water Club would not violate the Establishment Clause.

A. Secular Purpose.

As the Court has pointed out, the government may not act with the purpose of "endors[ing]" religion, *Mergens*, 496 U.S. at 249, or "promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335. There is no promotion or endorsement of religion here, as the defendants themselves have made clear. When the Board issued its conditional resolution recognizing the Walking on Water Club (without the Christian-only leadership provision on which the Hsus insist) the Board drew a *cordon sanitaire* between the School and the Club:

> the Superintendent of Schools is hereby directed to cause all listings, communications and announcements issued by the District pertaining to said Club expressly to state that the Roslyn School District does not endorse the Club, but is mandated by the Federal Equal Access Act to permit the Club's activities.

These terms meet the requirement of Justice Marshall's concurrence in *Mergens* (which, of the three opinions finding no Establishment Clause violation, was the one most worried about the tension between the Clause and the Equal Access Act, *see supra* note 23), that the School must "disassociate itself from the Club's religious speech" by, for example,

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than endorsement' ") (quoting *Mergens*, 496 U.S. at 248).

"affirmatively disclaim[ing] any endorsement of the Christian club." 496 U.S. at 270 (Marshall, J., concurring). Assuming that the School were to retain a similar disclaimer in recognizing the Walking on Water Club *with* its exclusionary policy, the School's stated purpose could not be mistaken for an endorsement. In any event, recognition of the Club in compliance with the Equal Access Act will serve the same purpose as Congress's purpose in passing the statute: "to prevent discrimination against religious and other types of speech." *Id.* at 249; *see supra* section III.C.

Even when the School's recognition is viewed in terms of an exemption from an overall nondiscrimination policy, the first branch of the "*Lemon* test" is still satisfied, as *Amos* demonstrates. Section 702 of the Civil Rights Act of 1964 gives religious groups an exemption from a generally applicable nondiscrimination law. In finding a secular purpose for that provision, the *Amos* Court stressed that a law's purpose need not be "unrelated to religion." 483 U.S. at 335. Here, the purpose for exempting the Club would be similar to the purpose underlying § 702: to "alleviate significant governmental interference with the ability" of the Club to engage in after-school prayers. *See id.* As discussed above, the Club reasonably insists that the actual leaders of its Christian prayers be Christians, on the assumption that only they have the necessary commitment and faith to do the job. The nondiscrimination policy interferes with the realization of the Club as a religious group. Under *Amos*, the removal of that impediment serves a secular function.

B. *The Primary Effect of Advancing Religion.*

In ascertaining whether the primary effect of the School's recognition would be to advance religion, the Court's analysis in *Mergens* and *Amos* is once again dispositive. In *Mergens*, the critical inquiry was whether the school "endorsed" the religious speech. 496 U.S. at 250. The Court specified that disclaimers of the type already devised by Roslyn High would guarantee that no reasonable student could conclude that the school was using its activities and influence to advance religion. *Id.* at 251. And as the *Mergens* Court made clear, the conduct of religious exercises in a school, with the school's sanction and under its "aegis," does not have the primary effect of advancing religion. *Id.* at 250-52. Nor is it impermissible, according to *Mergens*, for a club engaging in after-school prayers to have access to the school's bulletin boards, public address system, and newspaper. *Id.* at 247, 252. Finally, the *Mergens* Court has already found it immaterial that the religious club's announcements would have a captive audience composed of students who are required to attend school under compulsory attendance laws. *Id.* at 249-52; *cf. Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992) (impermissible for public high school to have rabbi give opening prayer at graduation ceremony, "because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid").

The School and the Anti-Defamation League raise all of these arguments anew. There is no indication, however, that the religious activities of the Walking on Water Club will be any different from the religious activities of the Bible club at

issue in *Mergens*. The Walking on Water Club may fill an after-school classroom with musical prayers, solicit new members with posters, or announce its meetings over the public address system. But these activities do not distinguish the Club in any meaningful way from the club in *Mergens*; nor do they suggest that recognition of the Walking on Water Club would have the primary effect of advancing religion.

The salient difference between this case and *Mergens*, of course, is the dispensation that the Club needs with respect to the School's nondiscrimination policy. But exempting the Club from the nondiscrimination policy simply puts the Club on the same footing as non-religious clubs who make distinctions among their members on the basis of commitment. In this situation, an exemption is a policy of neutrality. *See supra* section III.C.

Even if the exemption from the nondiscrimination policy is viewed as a "benefit," enjoyed only by the Walking on Water Club (and other sectarian religious clubs), there still is no Establishment Clause violation. As the Court explained in *Amos*, the flow of a "benefit" only to a religious group does not mean that the government's actions are advancing religion. The School--like Congress in enacting § 702 of the Civil Rights Act--would simply be "allow[ing the Club] to advance religion." 483 U.S. at 337. The exemption here provides a "benefit" to a religious group, as did the property tax exemption upheld by the Court in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). As in *Walz*, the benefit means that the religious group can do something it could not do before, and as a result may be able to better advance its religion. But allowing people with

religious faith to advance their religions is not what is meant by "the establishment of religion," as the Court made clear in *Walz*: for the authors of the Religion Clauses, "the 'establishment' of religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. at 668; *see also Amos*, 483 U.S. at 337. In other words, the state action itself must constitute an endorsement of religion. *Cf. Mergens*, 496 U.S. at 250 ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."). Since the exemption from the School's policy simply allows the Club to pursue a leadership policy that it reasonably considers critical to its ability to hold religious meetings at the school, and since *Mergens* decided that allowing such meetings does not constitute a state endorsement or advancement of religion, the exemption cannot be considered an endorsement by the School of the Hsus' religion or the Club's leadership policy. There is no showing that the exemption of the Walking on Water Club would constitute an endorsement of its activities. Absent such a showing, we can only conclude that the exemption would not have the primary effect of advancing religion.[27]

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[27] The Anti-Defamation League points for support to *Parents' Ass'n v. Quinones*, 803 F.2d 1235 (2d Cir. 1986), a case that predates both *Mergens* and *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141 (1993) (no Establishment Clause violation to allow religious community group to show religious-oriented film in school classroom after school). In *Quinones*, a public school, required by federal law to give remedial education to all "educationally deprived" students in the school district, provided remedial classes to 400 girls who attended a private Hasidic elementary school. The public school built new walls

C. Excessive entanglement.

Mergens concluded that a school's recognition of a

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closing off a previously open corridor so that the Hasidic students would be insulated from the largely-Hispanic public school population, as the Hasidic leaders and parents insisted. Yiddish-speaking teachers were provided for the classes, and "English as a Second Language" courses were taught, even though such courses were not available to the largely Spanish-speaking public school students. 803 F.2d at 1237-38.

We held that the school violated the Establishment Clause by creating a "symbolic link" between the school and the Hasidim "that is likely to have a magnified negative impact on the minds" of the students. *Id.* at 1241. We explained:

> The lengths to which the [school] has gone to cater to these religious views, which are inherently divisive, are plainly likely to be perceived, by the Hasidim and others, as governmental support for the separatist tenets of the Hasidic faith. Worse still, to impressionable young minds, the [school's] Plan may appear to endorse not only separatism, but the derogatory rationale for separatism expressed by some of the Hasidim.

Id. Having renovated the school solely to satisfy one religion's demand that there be no contact with public school students, the school in *Quinones* could not avoid sending a message of endorsement. This case is different. Here, the School is providing ordinary classroom space, as it does to other school groups, and has explicitly disclaimed any endorsement of the Club's activities. In addition, the "benefit" given to the Club (an exemption from the ban on religious discrimination) could not be desired by non-religious groups for any non-invidious purpose. The Hasidic girls, on the other hand, were provided with an exclusive benefit (English as a Second Language courses) that the other students legitimately wanted and may have needed. Finally, the school's support for the Hasidim had "a magnified negative impact on the minds" of the students because of the sect's "derogatory rationale [behind its policy of] separatism." Here, nothing suggests that the Club's rationale is "derogatory."

religious club under the Equal Access Act does not "impermissibly entangle government in the day-to-day surveillance or administration of religious activities," 496 U.S. at 253, because under the Equal Access Act,

> faculty monitors may not participate in any religious meetings, . . . nonschool persons may not direct, control, or regularly attend activities of student groups[,] . . . [and] school officials may not promote, lead or participate in any such meeting.

Id. (citing 20 U.S.C. § 4071(c)(2), (3), and (5)).

The potential source of entanglement in our case that was not present in *Mergens* is the Club's policy limiting its leaders to those who "accept Jesus Christ as savior"--which, according to the Hsus' counsel, means all Christians. The School worries that, if there is an argument within the Club about whether a particular student has or has not in fact "accepted Jesus Christ as savior," the School would be forced to mediate the dispute and to adjudicate the student's standing as a Christian. We agree that certification of religious qualifications would constitute excessive entanglement in a religious group's internal affairs.

But the School's anxiety is unwarranted. Leadership disputes that hinge on a student's supposed religious qualifications can be resolved internally by the members of the Club, who have the option, if there is a schism, of splitting the group into two different clubs. Alternatively, if the School is faced with rival claimants to leadership, it may treat each

faction as a separate club. If the squabbling gets out of hand, then (as counsel for the Hsus suggested at oral argument) the School would be justified in withdrawing recognition of the Club for "materially and substantially interfer [ing] with the orderly conduct" of the School. *See* 20 U.S.C. § 4071(c)(4). And of course, under *Tinker* and the line of cases discussed *infra* in section V.B., the accommodation of student expression does not require the School to lay down any instrument it needs to maintain discipline. Since we do not see how the School would necessarily become embroiled in the internal workings of the Club, we conclude that recognition will not entangle the School in the Club's religious activities.

In short, the Establishment Clause does not bar the School from recognizing the Walking on Water Club and its leadership provision.

V. Equal Protection and *Tinker*

The District argues that if it is forced to recognize the Club under the Equal Access Act, it will also be forced to abrogate its nondiscrimination rule entirely, and that the School will thereby lose the power to combat bias and discrimination. The School paints a picture of balkanized, hate-filled public schools where discriminatory clubs, formed by racists, bigots, and Nazi sympathizers, proliferate. This, says the School, cannot be what the Equal Access Act requires.

The Hsus suggest that this is precisely what the Act requires. In response to questioning by the district court, counsel for the Hsus stated that the Walking on Water Club

could exclude African-Americans if it wanted, 876 F.Supp. at 463, and that the School might well have to recognize a group of "skinheads" who wanted to exclude African-Americans.

We reject the arguments of both parties. First, the parties disregard the influence of the Equal Protection Clause, which is a well-fortified line of defense against invidious discrimination. Second, the *Tinker* line of cases--which allows public schools to restrict free speech rights when student speech "materially and substantially interferes" with the school--limits student freedom more sharply than the parties concede. Congressional supporters of the Equal Access Act made it clear during the floor debates that the Act adopted these limitations,[28] and that they did not intend the Act to open the school doors to hate groups, cults, and proselytizers. *See* 130 Cong. Rec. 19,232 (statement of Sen. Hatfield) (Equal Protection Clause will protect against discriminatory student groups); *id.* at 19,244 (Sen. Mitchell) (language of Act allows schools to bar cults and hate groups); *id.* at 20,941 (Rep. Goodling) (same); *id.* at 19,228 (Sen. Danforth) (language of

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[28] Subsections 4071(d)(5) and (d)(7) incorporate the Equal Protection Clause's constitutional limitations: "Nothing in this [Act] shall be construed to authorize [a school] . . . (5) to sanction meetings that are otherwise unlawful . . . or (7) to abridge the constitutional rights of any person." The protection provided by the *Tinker* line of cases is incorporated in subsections 4071(c)(4) and 4071(f): subsection 4071(c)(4) provides that a school offers a group "a fair opportunity" to meet if it "uniformly provides," *inter alia*, that "the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school"; subsection 4071(f) provides that, "Nothing in this [Act] shall be construed to limit the authority of the school . . . to maintain order and discipline on school premises [or] to protect the well-being of students and faculty."

Act allows schools to bar cults and proselytizers). We discuss these two types of protection in turn.

A. *Equal Protection.*

The Hsus argue that discrimination by an after-school student group that is suitably distanced from the school is a purely private action and that the Equal Protection Clause therefore does not come into play. The Hsus admit, however, that their club cannot exist without authorization from the School; indeed, the School's recognition is what the Hsus are seeking here. Thus, even though the Equal Access Act states that a school may not "sponsor [ ]" a club like the Hsus', 20 U.S.C. § 4071(c)(2), the School's grant of recognition, which the club needs in order to gain access to school facilities, authorizes and enables the club to pursue its exclusionary policy. In *Amos*, the state action was evident: Congress had enacted an exemption of religious groups from a generally applicable ban on religious discrimination in employment decisions. 483 U.S. at 329. The state action here is similar: recognition of the Club would mean an exemption for religious after-school clubs from one part of the School's nondiscrimination policy. This exemption would allow religious clubs to discriminate in a way that other clubs may not. Thus, a school's recognition of a club that discriminates does constitute state action and does implicate the Equal Protection Clause.

The exemption at issue in *Amos*, § 702 of the Civil Rights Act of 1964, was challenged under both the Establishment and Equal Protection Clauses. After finding no

Establishment Clause violation, the Court held that the Equal Protection Clause challenge should be analyzed under the rational basis test:

> [L]aws discriminating *among* religions are subject to strict scrutiny . . . . [But i]n cases such as these, where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny to a statute that passes the *Lemon* test. The proper inquiry is whether [the state actor] has chosen a rational classification to further a legitimate end.

Id. at 339. Section 702 met this standard because its purpose was to "alleviat[e] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.*

Justice Brennan's concurrence discussed in more detail why the rational basis test is appropriate for state action that allows religious groups to discriminate on the basis of religion:

> We are willing to countenance the [religious group's] imposition of [a religious] condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.

Id. at 342-43. This passage helps explain why recognition of

the Walking on Water Club does not also require the School to accommodate groups of student racists. What the Equal Protection Clause forbids is state action that implements or sanctions invidious discrimination. The use of heightened scrutiny for all cases of racial and sex discrimination implements both the suspicion that such discrimination is almost always invidious, and the policy that only the strongest reasons justify advantages based on race or sex. *See Loving v. Virginia*, 388 U.S. 1, 10-11 (1967); *Craig v. Boren*, 429 U.S. 190, 197-98 (1976). Similar suspicion accompanies the granting of benefits by the state to one religious group but not others. *See Amos*, 483 U.S. at 339. If any of these types of discrimination were present here, we would have a different case. But because religious discrimination by a religious group is "vital" to the group's religious mission and the ability of the group to define itself on the basis of shared faith, no great suspicion attaches to a government decision to allow it.

The Court in *Amos* was considering allowances made for a church, which of course the Walking on Water Club is not. But this Club is still a religious community that has the same need to define itself as other religious communities, notwithstanding its reliance on a public school to sanction its existence and to give it a roof. As in *Amos*, the state's accommodation of religious discrimination by a religious group allows the group to define and express itself in religious terms--a state motivation that is benign and a state purpose that is legitimate. In addition, state actions that allow religious discrimination only by religious groups impose no burdens on non-religious groups. Nor do such actions in any way subordinate or stigmatize non-religious groups by suggesting

that they are inferior, since they have their own ways of pursuing legitimate exclusions that help them define their groups and promote their agendas. Having considered the purpose for the exemption that the Club needs from the School, and the effect of exempting the Club from the School's nondiscrimination policy, we conclude that there is nothing invidious about it. *See Plyler v. Doe*, 457 U.S. 202, 216-17 & n. 14 (1982) (classifications based on prejudice are generally invidious); *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (importance of stigma); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (same).

Even if a school's accommodation of a religious group is motivated by the legitimate desire to facilitate the group's self-expression, and even if that accommodation does no harm to non-religious groups, the particular type of discrimination practiced by the group may lead to a finding of invidiousness. If authorized by the School, private act of invidious discrimination by a student club also constitutes a state act of invidious discrimination. Treating one religion differently than another will almost always be invidious. But determining whether discrimination is invidious in a particular case depends on an understanding of the context that informs and characterizes that discrimination. Understanding this context requires consideration of *who* is discriminating. The Walking on Water Club wishes to discriminate in one respect on the basis of faith. As the district court said, this is a type of discrimination that would be unlawful for the School "to engage in directly." 876 F.Supp. at 455. But the critical distinction here is that by granting the Walking on Water Club recognition on the Club's terms, the School would *not* be

engaging in this type of discrimination directly. It would simply be letting the Walking on Water Club do it.

Nothing in the record or the School's arguments suggests that the Walking on Water Club insists on Christian leaders because of animus against people of other religions. Since the Club exists solely to engage in Christian "praise of God," non-Christians suffer no articulable disadvantage by being unable to lead the Club's prayers and devotions. Nor is there any indication that the exclusion of non-Christians from Club leadership will subordinate or stigmatize them. Were any of these facts otherwise, the School might be justified in refusing an exemption from its nondiscrimination policy. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (IRS's refusal to grant tax-exempt status to a university with racially discriminatory admissions policies upheld using strict scrutiny analysis under the Free Exercise Clause, because of the government's "fundamental, overriding interest in eradicating racial discrimination in education").[29]

The School does not claim that any of these traditional signs of invidious discrimination are present. Instead, it argues that (i) all forms of discrimination on the basis of religion are invidious in all contexts, and (ii) allowing the Walking on Water Club to discriminate even on an innocuous basis will

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[29] The district court cited *Bob Jones* in equating "racial discrimination in education" with "discrimination based on religion in the school setting." 876 F.Supp. at 459. But as we have discussed, discrimination based on religion, depending on its contextual meaning, may properly be viewed with less suspicion than discrimination based on race (which is invariably subjected to the highest level of scrutiny).

pave the way for noxious forms of discrimination. We reject the first argument for the reasons stated above, since the invidiousness of religious discrimination will vary depending on the surrounding context. The concern expressed in the School's second argument is unwarranted. The Equal Protection Clause and the School's nondiscrimination policy still allow the School to resist these destructive forms of discrimination, precisely because they are invidious. But since there is no invidious discrimination here, we conclude that an exemption for the Walking on Water Club is consistent with the Equal Protection Clause.

B. *Tinker*

The School's power to prohibit invidious discrimination by student clubs is reinforced by a line of Supreme Court cases beginning with *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). In *Tinker*, the Court held that public schools may suppress speech or expressive behavior that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" or "impinge[s] upon the rights of other students," even if the expression could not be suppressed outside a public school. *Id.* at 509 (internal quotations omitted). *See also Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school." (internal quotations and citations omitted)). After all, one purpose of public education is to inculcate students with values that will make them better citizens:

> The[ ] fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

True, we analyze this case under the Equal Access Act, while the *Tinker* line of cases concerned the limits on First Amendment rights in public schools. Nevertheless, the Equal Access Act strikes the same balance that the Supreme Court has struck between First Amendment free speech rights and a public school's right to maintain order: the Act grants broad free speech rights under § 4071(a), and restricts those rights, under § 4071(c)(4), when club meetings "materially and substantially interfere with the orderly conduct of educational activities within the school."[30] *See also* 20 U.S.C. § 4071(f).

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[30] This phrase differs only immaterially from the standard in *Tinker*, which allows schools to prohibit expression that interferes with "appropriate discipline." The Act allows the suppression of expression that interferes with "the orderly conduct of educational activities." The phrase "educational activities" of course embraces practically everything schools

Thus, a school may deny recognition to a student group that would otherwise be entitled to protection under the Equal Access Act, if there are grounds for concluding that recognition of the group would materially and substantially interfere with the school's overarching mission to educate its students, as this standard has been explained by *Tinker*, *Fraser*, and *Kuhlmeier*. Valid grounds may include a school's concerns that a club's discriminatory policies would disadvantage, subordinate, or stigmatize the excluded students, debase the morals of students who practice the exclusion, or frustrate the teaching of the "fundamental values necessary to the maintenance of a democratic political system." *Fraser*, 478 U.S. at 681 (internal quotations omitted). These values include "tolerance of divergent political and religious views, even when the views expressed may be unpopular," *id.*, but also "disfavor the use of terms of debate highly offensive or highly threatening to others."[31] *Id.* at 683. *See Trachtman v. Anker*,

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do, including the availability of extracurricular opportunities.

[31] Supporters of the Equal Access Act understood the Act to preserve the authority of secondary schools to keep proselytizers from disrupting the educational process. *See, e.g.*, 130 Cong. Rec. 19,229 (statement of Sen. Danforth) (under the Act, "the school administration does have, does continue to have inherent power to prevent the unrestrained, intensive, extreme psychological pressure which could be utilized by some religious groups to attempt to bring other kids within the religious community"). The Walking on Water Club's constitution states that the Club "would like to spread the Good News of God and His word." There is no indication in the present record that this statement is meant to express anything other than a desire to "spread" Christianity to those non-Christians who voluntarily attend the Club's meetings. Other attempts to "spread" religion in a school might well be treated differently by school administrators.

563 F.2d 512, 519-20 (2d Cir. 1977) (school can prohibit *student newspaper's attempt to distribute sex questionnaire* to 9th and 10th graders, because substantial basis exists for concluding that they will be subjected to "peer contacts and pressures which may result in emotional disturbance"), *cert. denied*, 435 U.S. 925 (1978).

The School District contends that its nondiscrimination policy is the only way it can achieve an important educational objective: that students be free of any type of "discrimination." "Discrimination," says the District, "creates multiple 'classes' of students, balkanizes the student community and breeds contempt, distrust and dissen[s]ion." But of course, high school students are subjected to discrimination and selection all the time: sports teams may be divided into girls and boys teams, some students may be allowed on the honor roll and others may not be, upper-level courses may be open to juniors and seniors but not to others, extracurricular activities may be closed to students who do not maintain a certain grade point average, *see Pope v. East Brunswick Bd. of Ed.*, 12 F.3d 1244, 1255-56 (3d Cir. 1993), and leadership positions in a club like Students Against Drugs may be inaccessible to students who advocate the legalization of drugs. Clearly, some types of discrimination are permissible in a high school setting, and some are not. The district court concluded that "a school-recognized club that is permitted to discriminate on the basis of religion likely would be disruptive to the educational mission of the school," because it would be "invidious" and would impinge on the "rights of other Roslyn students to be free from discrimination in school." 876 F.Supp. at 462. But as we explained in section V.A., *supra*, religious discrimination

is not automatically invidious in a religious club; and the right of other students to be free from invidious discrimination is not infringed here. As the Court said in *Fraser*, a school may encourage "tolerance of divergent political and religious views" as part of its mission to inculcate "fundamental values," 478 U.S. at 681, although this type of tolerance need not extend to "highly offensive or highly threatening" speech. *Id.* at 683. The School does not (and we think cannot) argue that the discriminatory leadership polcy of the Walking on Water Club is highly offensive or threatening.

It is a delicate task to supervise student discrimination and exclusion to ensure that it is consistent with "fundamental values" and is not "invidious." Schools may encounter student religious groups that want to discriminate invidiously on the basis of religion, by excluding others out of bias or by stigmatizing those excluded. We admit that the line between invidious and non-invidious discrimination does not glow in the dark. But for better or worse, schools have had to draw that line ever since the *Tinker* case in 1969.

In doing so, public school administrators must be given a great deal of autonomy in deciding how best to run their schools: "[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*, 484 U.S. at 273. We must recognize, however, that the Equal Access Act is a definite, though measured, interference in these purely local decisions. A school's conclusory statement that prayer meetings will substantially and materially impede the orderly conduct of the school is an insufficient weight in the balance

struck by the Act.[32] *See Tinker*, 393 U.S. at 508 ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."). And here, the School offers nothing beyond these conclusory assertions. Based on this record, we conclude that allowing the Walking on Water Club to guarantee that three of its prayer leaders will be Christians does not constitute "substantial and material interference" with the School's mission of educating and disciplining.

VI. Preliminary Injunction

Having determined that the Hsus are likely to succeed on their claim that the Equal Access Act requires Roslyn High School to recognize the Walking on Water Club with its leadership provision (as applied to three of its leaders), and that this recognition is constitutional, we conclude that the second prong of the preliminary injunction standard (likelihood of success on the merits) is satisfied. The first prong is satisfied as well, since Timothy Hsu has been suffering and continues to suffer irreparable harm. The Equal Access Act protects free

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[32] The district court found it "determinative" that the intent underlying the School's nondiscrimination policy was not to "suppress [ ] . . . religious speech or beliefs, but [to] further[ ] the School's interest in protecting the well-being of all students." 876 F.Supp. at 455. But as the Court explained in *Tinker*, the fact that a school's suppression of student expression is well-intentioned does not make the suppression permissible. *Tinker*, 393 U.S. at 508 (school's suppression of black armbands based on "fear of a disturbance from the wearing of the armbands" held impermissible, notwithstanding district court's finding that the fear was reasonable).

speech rights. As mentioned above, we follow the Supreme Court and take no position on whether the Equal Access Act is required by the First Amendment or whether it extends free speech rights beyond the scope of the First Amendment. *See supra* note 6. Either way, the Act protects "expressive liberties," and we therefore take guidance from the Supreme Court's oft-quoted statement that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) (statement in *Elrod* is justified by "our historical commitment to expressive liberties"). In past cases, we have extended that principle to conclude that prisoners are irreparably injured when they are denied access to published reports containing criticisms of prison conditions, *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1026 (2d Cir. 1985) (quoting *Elrod*), and that parents of public school students are irreparably injured when the school provides separate remedial education classes to a discrete religious group (even though the parents' "expressive liberties" were not infringed). *Parents' Ass'n v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986) (quoting *Elrod*). We believe that the denial for one year (now two years) of the right to pray in an after-school Bible group as envisioned by the Hsus also constitutes "irreparable inury," and that the Hsus are entitled to the issuance of a preliminary injunction so that the injury will cease.

VII. Conclusion

Our holding is narrow. We do not hold that administrators must allow religious discrimination in the

schools. Religious discrimination by student clubs will often be invidious and will rarely fall within our holding. However, when a sectarian religious club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must allow it to do so unless that club's specific form of discrimination would be invidious (and would thereby violate the equal protection rights of other students), or would otherwise disrupt or impair the school's educational mission. Courts must be extremely reluctant to overrule the judgment of local school administrators who are responsible for making these sensitive decisions. But in this case, the only judgment Roslyn High School has made is that *every* instance of religious discrimination by a student group is invidious and disrupts the school's mission. Invidious discrimination entails more context-specific judgments. We hold only that, on this record, the Hsus are *likely to succeed* on that part of their Equal Access Act claim that relates to the Club's President, Vice-President, and Music Coordinator. We therefore affirm in part, reverse in part, and remand for the issuance of an injunction and additional proceedings (if necessary) that are consistent with this opinion. *See Patton v. Dole*, 806 F.2d 24, 31 (2d Cir. 1986) ("Although reversal of an order denying an application for a preliminary injunction is customarily accompanied by a directive that the district court conduct a new hearing on remand, an appellate court, on a finding of merit in plaintiff's case, can in the alternative direct the district court to issue the injunction."); 11A Charles A. Wright, et al., *Federal Practice and Procedure*, § 2962 at 448 (1995).

VAN GRAFEILAND, *Circuit Judge*, concurring in part and

dissenting in part.

Much, perhaps too much, ink has been spilt in attempts to define the proper relationship between government and religion. Accordingly, I will explain as briefly as possible why I concur only in part with Judge Jacobs' thorough opinion.

At the outset, although the issue is not before us, I am not convinced that the Walking on Water Club is precluded from limiting its membership to Christians. *See* 20 U.S.C. § 4071(a); *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988). Conformity by members of a religious organization to the standard of morals required of members has been recognized as a proper function of religious establishments since the early case of *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872).

Turning to the question now at issue, I would hold that the right to select all of Walking on Water Club's officers was solely the prerogative of that concededly religious club. The following language from Justice Brennan's concurring opinion in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341-42 (1987), although addressed specifically to religious corporations, is, I think, clearly appropriate here:

> [R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to:
>
> "select their own leaders, define their own

> doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause." Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L.Rev. 1373, 1389 (1981).

See also Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (church has interest in effecting binding resolution of internal governance disputes); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952) (state statute purporting to transfer administrative control from one church authority to another violates Free Exercise Clause). For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious

freedom as well.

Id. (footnote omitted). *See also Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990); *Dowd v. Society of St. Columbans*, 861 F.2d 761, 764 (1st Cir. 1988); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493-94 (5th Cir. 1974); *McClure v. Salvation Army*, 460 F.2d 553, 558-61 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

I believe that the Club members are better qualified than are we to determine the duties and necessary qualities of all their leaders.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in thousand nine hundred and ninety-six.

Hsu

Plaintiffs-Appellants/Cross Appellees,

v. **Dkt No: 95-7311**

Roslyn Union Free

Defendants-Appellees/Cross-Appellants,

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellee's.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By:/s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

[Filed on: July 23, 1996]

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Index No. CV 94-0659.

Decided Feb. 21, 1995.

Emily HSU, By and Through her next friend, Dr. Chin-Ching HSU, Timothy Hsu, By and Through his next friend, Dr. Chin-Ching Hsu,

***Plaintiffs*,**

v.

ROSLYN UNION FREE SCHOOL DISTRICT NO. 3, et al.,

***Defendants*.**

Appearances:

Migliore & Infranco, P.C. by Joseph P. Infranco, Commack, NY, for plaintiffs.

Jaspan Ginsberg Schlesinger Silverman & Hoffman by Stanley A. Camhi, Garden City, NY, for defendants.

WEXLER, District Judge.

Plaintiffs Emily Hsu and Timothy Hsu, students at Roslyn High School, through their parent and guardian Dr. Chin-Ching Hsu, bring this action against defendants Roslyn Union Free School District No. 3 (the "School District"), the President, Vice-President and the other members of the School District's Board of Education (the "School Board") in their official capacities, the Superintendent and Assistant Superintendent of the School District in their official capacities, and the present and former Principals of Roslyn High School in their official capacities, for injunctive, declaratory, and monetary relief challenging enforcement of defendants' policy prohibiting discrimination on the basis of religion as applied to a student bible club organized by plaintiffs. Plaintiffs allege that the School District's nondiscrimination policy, as applied to the bible club in the form of an "open officership" requirement, violates plaintiffs' rights under the Equal Access Act ("EAA" or the "Act"), 20 U.S.C. § 4071 et seq., the First and Fourteenth Amendments of the United States Constitution, and the recently-enacted Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, 42 U.S.C. § 2000bb et seq., as well as the New York State Constitution. Presently before the Court are plaintiffs' motion for a preliminary injunction to prevent defendants from enforcing the nondiscrimination policy, and defendants' cross-motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

I. BACKGROUND

The facts as alleged in plaintiffs' 38-page amended complaint and plaintiffs' affidavits are summarized as follows. When this action was commenced, plaintiffs Emily Hsu and Timothy Hsu were students of Roslyn High School, a public high school for grades nine through twelve located in Roslyn, New York, within the defendant School District. Amended Complaint ¶¶ 7, 9, 21. Emily Hsu presumably has graduated since that time[1] Timothy Hsu has not. The school is controlled and operated under the authority of the School Board, and receives federal financial assistance. Id. ¶ 21. Defendants permit student groups to voluntarily meet on school premises during noninstructional time. Id. ¶¶ 1, 22. Plaintiffs identify nearly three dozen clubs meeting on the school's premises with recognition by defendants, including, for example, the Chess Club, Art Club, Math Club, Mock Trial, Key Club, Fashion Club, Peer Counseling, Model Congress, and Jazz Band. Id. ¶ 22. While many of these clubs are curriculum related, some are noncurriculum related. Id. Each of these recognized clubs is granted certain rights and privileges, including access to meeting areas and the right to advertise. Id. ¶ 1.

Sometime in or before September 1993, plaintiffs undertook to form a new club, a Christian bible club, at Roslyn High School. Id. ¶ 24. In September 1993, Emily Hsu met with defendant Mark Weyne ("Weyne"), the principal of

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[1] Assuming that is the case, this action is rendered moot only to the extent it seeks injunctive relief on her behalf. See, e.g., Clark v. Dallas Indep. Sch. Dist., 806 F.Supp. 116, 119 (N.D. Tex. 1992) (graduated high school students did not lack standing to raise constitutional challenges seeking declaratory and monetary relief).

Roslyn High School at that time, and requested permission to use the school facilities for the proposed bible club. Id. ¶ 25; Affidavit of Emily Hsu in Support of Amended Complaint and Motion for Preliminary Injunction ("Emily Hsu Aff.") ¶ 9. Weyne informed Emily Hsu that he needed to research the question and would contact her with a response. Amended Complaint ¶ 25. By November 1993, Weyne still had not contacted Emily Hsu concerning the proposed bible club. Id. ¶¶ 25-26; Emily Hsu Aff. ¶ 10. Sometime in mid-November 1993, Emily Hsu and Jane Shin ("Shin"), another student interested in forming the bible club, met with Weyne and defendant Marilyn Silverman ("Silverman"), Assistant Superintendent of the School District. Amended Complaint ¶ 28; Emily Hsu Aff. ¶ 11. At that meeting, defendants informed Emily Hsu and Shin that they were checking the legality of the proposed student bible club and would contact them with their decision. Amended Complaint ¶ 28; Emily Hsu Aff. ¶ 11. Later in November, Emily Hsu and Shin were informed (although plaintiffs do not indicate by whom) that the School Board would discuss the proposal for a student bible club at a December 2, 1993 meeting. Amended Complaint ¶ 29; Emily Hsu Aff. ¶ 12.

At the December 2, 1993 School Board meeting, Silverman stated that the School District was required to grant the bible club access, even though it did not want the club to meet. Emily Hsu Aff. ¶ 15. Silverman also stated that six provisions were required for the club's approval, the first of which was that "membership must be open to all Roslyn

students." Id.[2] During the meeting, one of the female board members suggested that the School District "merely refuse federal financial assistance" to avoid the requirements of the EAA. Id. ¶ 16. After a public discussion was held, the bible club's proposal was tabled. Amended Complaint ¶¶ 31-33; Emily Hsu Aff. ¶¶ 14-18.

On or about December 15, 1993, plaintiffs' counsel sent a letter to the School District, claiming that defendants had violated Emily Hsu's rights under the United States Constitution and the EAA. Amended Complaint ¶ 35; Emily Hsu Aff. ¶ 20. On January 6, 1994, Emily Hsu and Shin met with Silverman and defendant Dr. Howard Rubin ("Rubin"), who replaced Weyne as principal of Roslyn High School. Amended Complaint ¶ 36; Emily Hsu Aff. ¶ 21. During that meeting, Silverman and Rubin informed Emily Hsu that the School Board had taken no action on permitting the bible club to meet, and that the School Board required a constitution for the proposed bible club before it could decide whether to permit the club to meet. Amended Complaint ¶ 36; Emily Hsu Aff. ¶ 21.

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[2] The other five provisions were as follows:

> [1] faculty members may only be provided to supervise the meetings in a non-participatory manner; [2] no non-Roslyn High School student may conduct or attend the meetings on a regular basis; [3] meetings may occur only during non-instructional school hours; [4] no public funds will be expended on the club except those funds which are incidental to the operation of the room used by the club; and [5] it must be clear that Roslyn does not endorse the message of the club.

Emily Hsu Aff. ¶ 15.

On January 12, 1994, Emily Hsu submitted the bible club's constitution to Silverman. Amended Complaint ¶ 40 & Ex. C; Emily Hsu Aff. ¶ 22.[3] On January 21, 1994, Silverman informed Emily Hsu that the School Board "had a problem with the Christian Bible club's constitution." Amended Complaint ¶ 40 & Ex. C; Emily Hsu Aff. ¶ 23. Specifically, Silverman indicated that "there were two sections of the constitution which the [School Board] wanted changed": Article I, Section I and Article V, Section II. Amended Complaint ¶ 40; Emily Hsu Aff. ¶ 23. In this respect, Silverman stated that the School Board wanted the word "Christian" changed to "people" in the constitution's definition of "Christian fellowship," Article I, Section I; this definition provided that "Christian fellowship is when Christians gather to praise God . . . ." Amended Complaint ¶ 42; Emily Hsu Aff. ¶ 24. Silverman explained that the School Board "felt that the word 'Christian' was too exclusive." Amended Complaint ¶ 42; Emily Hsu Aff. ¶ 24. Emily Hsu eventually made this change to the club's constitution. However, plaintiffs claim that "Emily Hsu, under coercion, yielded to the requirement and made this change as a good faith effort to resolve the conflict with the [School Board] and end the chilling of her civil rights." Amended Complaint ¶ 42; Emily Hsu Aff. ¶ 24. The second section the School Board wanted changed was Article V, Section II, which provided that "[o]fficers must be professed Christians either through baptism or confirmation." Silverman explained that the School Board wanted this section changed so that "officers merely were required to be members of the Christian Bible club

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[3] See Constitution of the Roslyn High School Walking On Water Club (Christian Fellowship), in Appendix A hereto.

with the right to vote." Amended Complaint ¶ 44; Emily Hsu Aff. ¶ 25. Plaintiffs claim that in response to this request, "again, pressured by government coercion," Emily Hsu and Shin changed the club's constitution to read: "All members eligible to vote will also be eligible to run for offices. Accepting Jesus Christ as savior is a requirement for all officers." Amended Complaint ¶ 46; Emily Hsu Aff. ¶ 26.

On or about January 26, 1994, Emily Hsu and Shin met with Silverman and defendant Frank Tassone ("Tassone"), Superintendent of the School District. Amended Complaint ¶ 47; Emily Hsu Aff. ¶ 27. Silverman and Tassone again requested that before consideration and approval of the Christian bible club, Emily Hsu and Shin remove the requirement from the club's constitution that officers must be Christians. Amended Complaint ¶ 47; Emily Hsu Aff. ¶ 27. Emily Hsu and Shin refused to comply with this request, "because this act would violate their sincerely-held religious beliefs that all club officers should be Christians." Amended Complaint ¶ 47; Emily Hsu Aff. ¶ 27. Silverman and Tassone stated that the School Board would not approve the constitution with this requirement, and told Emily Hsu and Shin to submit a new constitution for the club. Amended Complaint ¶ 49; Emily Hsu Aff. ¶ 27.

Thereafter, on or about January 31, 1994, Emily Hsu submitted the bible club's constitution, without further revision, to Silverman, who refused to submit the constitution to the School Board for its approval. Amended Complaint ¶ 50; Emily Hsu Aff. ¶ 28. On February 14, 1994, after Emily Hsu "determined that the Christian Bible club would not be

permitted to meet," Amended Complaint ¶ 51; Emily Hsu Aff. ¶ 30, plaintiffs commenced this action and requested a preliminary injunction enjoining defendants from denying the bible club access to the school's facilities. Subsequently, on or about March 10, 1994, before any hearing on the preliminary injunction motion, the School Board passed a resolution recognizing the formation of, and granting access to, the bible club (the "March 10 Resolution"). Amended Complaint ¶ 52; Emily Hsu Aff. ¶ 31.[4]

On the date scheduled for argument of the preliminary injunction motion, plaintiffs' counsel indicated at a conference before the hearing that plaintiffs intended to file an amended complaint challenging the condition in the first enumerated paragraph of the March 10 Resolution, which provides:

> Membership in the Club shall be limited to Roslyn High School students, and no student shall be discriminated against or excluded from participating in or having access to the Club, including without limitation entitlement to be an officer of the Club, on the basis of creed or religion.

See Appendix B (emphasis added). Plaintiffs also indicated their intent to renew their motion for a preliminary injunction upon filing their amended complaint. The parties thereupon agreed to a filing date for the amended complaint and a briefing schedule for plaintiffs' preliminary injunction motion.

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[4] The March 10 Resolution is set out in relevant part in Appendix B hereto.

Defendants maintain that the above paragraph of the March 10 Resolution and the earlier changes to the bible club's constitution requested by school officials were required by the School District's nondiscrimination policy embodied in two policies previously enacted by the School Board: (1) Policy 0100, entitled "Equal Opportunity"; and (2) Policy 5020, entitled "Equal Educational Opportunity." The Equal Opportunity policy provides:

> The [School] Board, its officers and employees will not discriminate against any student . . . on the basis of race, color, national origin, creed or religion, marital status, sex, age or handicapping condition.
>
> This policy of nondiscrimination includes: access by students to . . . student activities . . . .

Affidavit of Frank Tassone ("Tassone Aff.") Exh. C. The Equal Educational Opportunities policy provides:

> The [School] [D]istrict shall provide every student with equal educational opportunities regardless of race, color, creed, sex, national origin, religion, age, marital status, or disability.
>
> No student will be excluded on such basis from participating in or having access to any . . . extracurricular activities or other school resources.

Id. According to defendants, the School District's nondiscrimination policy pre-dated plaintiffs' request for

recognition of the bible club and has been imposed on all student clubs. Id. ¶¶ 15, 30.

Plaintiffs vigorously object to the School District's refusal to exempt the bible club from the nondiscrimination policy as to eligibility to run for office. Plaintiffs contend that each officer of the club "carries a significant spiritual responsibility and import." Amended Complaint ¶ 53; Emily Hsu Aff. ¶ 32; Affidavit of Timothy Hsu in Support of Amended Complaint and Motion for Preliminary Injunction ("Timothy Hsu Aff."), ¶ 10. To this end, plaintiffs detail the activities to be performed by the officers of the club, namely, the President, Vice-President, Secretary, Music Coordinator and Activities Coordinator. Timothy Hsu Aff. ¶¶ 11-15; Amended Complaint ¶¶ 54- 58. Among other activities, the President is responsible for the "overall spiritual direction and oversight of the Bible club" and "the spiritual content of the regular weekly meetings." Timothy Hsu Aff. ¶ 11(A), (B); Amended Complaint ¶ 54(A), (B). The Vice-President is required to assist the President in the performance of the President's duties and, in the President's absence, to perform the presidential functions. Timothy Hsu Aff. ¶ 12(A), (B); Amended Complaint ¶ 55(A), (B). Similarly, the Secretary, in the President's and Vice- President's absences, is required to perform the presidential functions. Timothy Hsu Aff. ¶ 13(B); Amended Complaint ¶ 56(B). The Music Coordinator is responsible for "the selection of appropriate praise and worship songs to be used at the weekly meeting" and for "lead[ing] the singing and worship of the Lord by 'exhalt[ing] the Lord Jesus Christ and creat[ing] a sense and spirit of unity among those singing.' " Timothy Hsu Aff. ¶ 14(A), (B); Amended

Complaint ¶ 57(A), (B). Lastly, the Activities Coordinator is responsible for planning and oversight of activities and "determining which activities would be appropriate in which to participate, e.g., a canned food drive, and those activities in which participation would offend Christian sensibilities, e.g., condom distribution." Timothy Hsu Aff. ¶ 15(A), (B); Amended Complaint ¶ 58(A), (B). In addition to their other activities, each officer is required to (1) "[b]e prepared . . . to be called upon at any time to open or close a meeting with prayer . . . or to lead a Bible study"; (2) "[b]e prepared . . . to serve as a spokesperson for the Bible club in relating the Christian perspective on any particular issue"; and (3) "be able to give testimony to the life-changing presence of Jesus Christ in his/her life and relate that experience in terms of on-going application to the lives of others." Timothy Hsu Aff. ¶¶ 11(C), (D) and (E); 12(C), (D) and (E); 13(C), (D) and (E); 14(C), (D) and (E); and 15(C), (D) and (E); Amended Complaint ¶¶ 54(C), (D) and (E); 55(C), (D) and (E); 56(C), (D) and (E); 57(C), (D) and (E); and 58(C), (D) and (E). In short, the roles of these officers, according to plaintiffs, are "to not only participate but lead the club in [its] activities." Plaintiffs' Memorandum in Support of Amended Complaint and Motion for Preliminary Injunction ("Pls. Mem."), at 2-3 (emphasis in original).

Based on the roles of the bible club's officers, plaintiffs argue that the condition prohibiting the club from requiring that officers be "professed Christians" "would influence the form and content of both the club itself, the day to day activities of its members and result in a violation of Plaintiffs' sincerely-held religious beliefs that all club officers should be

Christians." Amended Complaint ¶ 53. As a result, plaintiffs claim the School District's "permission for the formation of the Christian Bible Club, contingent upon non-Christians being allowed as officers in the Club," Pls. Mem. at 4, violates the EAA, the First and Fourteenth Amendments, and the RFRA.

Following oral argument on the preliminary injunction motion, the Court reserved decision. This opinion follows.

II. DISCUSSION

A. Preliminary Injunction

In the Second Circuit, to obtain a preliminary injunction the moving party must show: " '(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of the hardships tipping decidedly toward the party requesting the preliminary relief.' " Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676, 679 (2d Cir. 1988) (quoting Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam)).

B. Irreparable Harm

Defendants contend that plaintiffs will not suffer irreparable harm because the club has been granted access and is not being deprived of their First Amendment rights, and because the club has refused to comply with the condition as to officership and has held no meeting. Defendants'

Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Defendants' Cross-Motion for Judgment on the Pleadings ("Defs. Mem."), at 8. Defendants misconstrue plaintiffs' contention as to irreparable harm. Essentially, plaintiffs claim that defendants have impermissibly conditioned their access to the school forum in violation of, inter alia, their First Amendment rights. If, as plaintiffs contend, they are being deprived of their First Amendment rights by defendants' nondiscrimination policy, they have and will continue to sustain irreparable harm. As the Supreme Court has stated: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976); see Deeper Life, 852 F.2d at 679. Accordingly, this Court finds that plaintiffs have demonstrated that they will suffer irreparable harm.

C. Plaintiffs' Claims

Plaintiffs claim that they are entitled to preliminary injunctive relief because the School District, by imposing its nondiscrimination policy on the bible club,[5] has violated the

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[5] Plaintiffs pose their claims as a challenge to the School District's attempt to condition "permission for the formation of the Christian Bible Club . . . upon non-Christians being allowed as officers in the Club." Pls. Mem. at 1-2. The amended complaint indicates that plaintiffs believe the School District cannot impose a nondiscrimination policy upon the bible club as to either membership or leadership, i.e., officership, in the club, but plaintiffs have argued only that the policy is impermissible as applied to officership.

EAA, the First and Fourteenth Amendments, and the RFRA.[6] The Court must analyze each of these claims to determine whether plaintiffs have satisfied the second prong of the preliminary injunction standard. Neither party cites any case on point, and the Court has found none.

1. Equal Access Act Claim

The EAA requires public secondary schools receiving federal financial assistance to grant equal access to student groups if the school maintains a "limited open forum," i.e., if it permits "one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(a) and (b).[7] In Board of Education of Westside

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[6] Plaintiffs do not address the merits of their state constitutional claim on this motion, apparently choosing to raise only their federal constitutional and statutory claims. Accordingly, this Court does not address the state law claim at this time.

[7] Section 4071(a) provides:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a). Section 4071(b) provides:

> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

Community Schools v. Mergens, 496 U.S. 226, 236 (1990), the Supreme Court held that where the Act's obligations are triggered, the "school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time." The Court further held that the Act, on its face and as applied to allow access to a student religious group, does not violate the Establishment Clause. Id. at 253.[8] The Act, the Court noted, was "intended to address perceived widespread discrimination against religious speech in public schools." Id. at 239. To this end, the "Act's central command [is] that schools not discriminate against religious speech." See Garnett v. Renton Sch. Dist. No. 403, 987 F.2d 641, 645 (9th Cir.), cert. denied,114 S.Ct. 72 (1993).

The issue is not whether the EAA requires the School District to open its forum to the bible club, for the School District has already agreed to permit the bible club to meet. Nor is the issue, contrary to plaintiffs' arguments, whether the EAA prohibits the School District from determining the leaders, i.e., the "officers," of the student-initiated and student-led bible club, for the School District does not seek to do that. Rather, the issue is whether the EAA requires the School District to exempt a student-initiated and student-led

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20 U.S.C. § 4071(b).

[8] Although not important for the present purposes, the Court set forth the definition of a "noncurriculum related student group" that would trigger the Act's requirement of equal access.

religious club from its nondiscrimination policy, purportedly applied to all student clubs, and permit the club to exclude students from running for office upon the basis of religious beliefs, although the club is open to all students on a voluntary basis.[9]

The crux of plaintiffs' EAA claim is that the March 10 Resolution's "open officership" requirement, see Pls. Mem. at 11-12, violates § 4071(d)(1) of the EAA, which provides: "Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof--(1) to influence the form or content of any prayer or other religious activity." 20 U.S.C. § 4071(d)(1). Plaintiffs argue that the "plain language of this statute prohibits the School District from attempting to influence the Bible Club's structure." Pls. Mem. at 8 (emphasis added). In this respect, plaintiffs argue that the "manifest meaning of the word 'form' is: 'the shape and structure of something . . . .' " Id. at 8 (quoting Webster's Third New Int'l Dictionary 892 (1993)). Thus, plaintiffs reason, the School District's policy requiring "open officership without reference to religion and creed" is an attempt to influence the "structure" of the club, which translates into an attempt to influence the "form" of the club's activity. Id. Based on the

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[9] Whether an "open membership" or "open officership" requirement, see Pls. Mem. at 11-12, violates the Act was not at issue in Mergens; notably, however, membership in the student bible club there "would have been voluntary and open to all students regardless of religious affiliation." Mergens, 496 U.S. at 232. Similarly, in Garnett, the "[p]laintiffs' group was student initiated, and would have been student led and open to any student on a voluntary basis." Garnett v. Renton Sch. Dist. No. 403, No. CV-87-1294, 1994 WL 555397, slip op. at 3 (W.D. Wash. Sep't 15, 1994).

same reasoning, plaintiffs argue that the School District's policy also violates § 4071(c)(1) of the Act. This subsection provides that a school offers a "fair opportunity" to students who wish to conduct a meeting within its limited open forum if the school provides that the "meeting is voluntary and student initiated." 20 U.S.C. § 4071(c)(1). Plaintiffs argue that the School District cannot comply with this "fair opportunity" criterion because the "Bible Club structural requirements are neither 'voluntary,' nor 'student initiated.' Once the Roslyn School District became intimately involved in structuring the workings of the Club, it crossed the impassable boundaries of the [Act]." Pls. Mem. at 9. According to plaintiffs, the School District, by its actions, became impermissibly involved in the "administration of religious activities" in violation of the Act. Id. at 9-10 (citing Mergens, 496 U.S. at 253). In addition, plaintiffs argue that the School District's "requirement was created by the School Board just to impede the formation of the Bible Club." Id. at 11. For these reasons, plaintiffs argue, the School District may not impose an "open officership" policy upon the bible club or condition access thereon.

Defendants maintain that application of the School District's nondiscrimination policy to the bible club does not contravene the Act, and that the School District has satisfied its obligations under the Act by affording the bible club access to its facilities on the same basis and subject to the same terms and conditions as all other noncurriculum-related student clubs.[10] Defendants assert that the School District's

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[10] The benefits afforded a student group upon school recognition include, inter alia, use of a school room, the school's public

nondiscrimination policy pre-dated plaintiffs' request for recognition of the bible club, and that the policy has been imposed on all student clubs. Tassone Aff. ¶¶ 15, 30. Defendants argue that the Act "does not require that the [School] District afford a religion club 'privileges' which are not available to other non- curriculum clubs." Defs. Mem. at 14-15. Rather, according to defendants, the club must

> be open, in all respects, to all members of the student body without regard to their religious beliefs. Students may openly express their religious beliefs at club meetings--even as part of an election campaign. Requiring a student, however, to subscribe to a particular religious belief as a condition of eligibility to hold office is not permitted.

Tassone Aff. ¶ 23 (emphasis in original). Defendants rely principally on § 4071(d)(5) and (7), which provide that the Act shall not be construed to authorize a school district "to sanction meetings that are otherwise unlawful," 20 U.S.C. § 4071(d)(5), or "to abridge the constitutional rights of any person," id. § 4071(d)(7). By allowing the bible club and its members to discriminate against other students on the basis of religion, defendants maintain that the School District would be sanctioning abridgement of excluded students' constitutional rights (i.e., denial of free exercise of religion, association and speech rights of those students excluded from officership on the

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address system and bulletin boards, and use of the school's hallways to hand out fliers and solicit other students to become members of the club. Tr. 16.

basis of religious speech and beliefs), and sanctioning meetings unlawful under the Fourteenth Amendment of the United States Constitution, Article 1, § 11 of the New York State Constitution,[11] and § 44-a of the New York Civil Rights Law.[12] See Defs. Mem. at 15, 17-19.[13] According to defendants, the

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[11] Article 1, § 11 provides in part: "No person shall, because of race, color, creed or religion, be subjected to any discrimination in civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." N.Y. Const. art. 1, § 11.

[12] Defendants refer to section 44-a to the extent it provides: "A person who . . . [e]xcludes a citizen of this state, by reason of race, color [or] creed . . . from the equal enjoyment of any accommodation, facility or privilege furnished by . . . public institutions of learning . . . is guilty of a misdemeanor . . . ." N.Y. Civ. Rights Law § 44-a(1) (McKinney 1992).

[13] Defendants reason as follows:

> The provision in plaintiffs' proposed constitution clearly discriminates against those non-Christian students who choose to be members of the club, but, who, based on their religious beliefs, are unable to declare their acceptance of Jesus Christ as their Savior. Students frequently join a number of student clubs, including those clubs which present cultures and offer experiences other than those they are already familiar with. Students of Hispanic descent may, for example, join the French Club. It is foreseeable that non-Christians may wish to join the [bible] club in an effort to expand their knowledge of different religions and to meet people with different backgrounds. Indeed, they may take their membership very seriously and wish to hold office not because they intend to be subversive, but because they truly want to promote the club's activities. To deprive these students of meaningful membership by denying them an equal opportunity to participate in all club activities, simply because they hold different religious beliefs, would violate federal and New York State law. Access for such a club is not mandated by the Equal Access Act.

Defs. Mem. at 18-19.

School District, by requiring the bible club to abide by the nondiscrimination policy, was simply exercising authority to "protect the well-being of the student body and to advance the educational activities and mission of the District," authority expressly recognized by § 4071(f) of the Act. Id. at 15-16. Section 4071(f) provides: "Nothing in [the Act] shall be construed to limit the authority of the school . . . to maintain order and discipline on school premises [and] to protect the well-being of students . . . ." 20 U.S.C. § 4071(f).

The Court begins with the plain language of the statute. See Mergens, 496 U.S. at 237. Section 4071(a) prohibits the School District from denying the bible club "equal access." Equal access provides a student bible club the right "to meet on school property on the same basis as other non-curriculum related clubs." Garnett, 987 F.2d at 646 (emphasis added). The provisions of subsection (d) designate rules of construction applicable to the Act, not exceptions to it. See id. at 644-45. "As such, [subsection (d)] instruct[s] the court how to interpret the Act's central command that schools not discriminate against religious speech." Id. at 645. Essentially, subsection (d) instructs that school officials not unconstitutionally apply the Act. Id.

In Mergens, the Supreme Court found that the EAA "reflected at least some consensus of a broad legislative purpose." 496 U.S. at 239. A broad reading, the Court determined, "would be consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion before and after classes." Id. Thus, the Supreme Court determined that the entire Act "must be read to

effectuate a broad Congressional purpose." Garnett, 987 F.2d at 645. The Act's legislative history, however, provides no specific guidance as to whether the School District's nondiscrimination policy as applied to plaintiffs' bible club violates the Act.

Assuming, as the School District maintains, that it subjects all noncurriculum-related student clubs to its nondiscrimination policy, the School District complies with the Act by granting the bible club access subject to the same terms and conditions as all other noncurriculum-related student clubs. Providing access to the bible club on the same basis as all other noncurriculum-related student clubs amounts to "equal access." See Garnett, 987 F.2d at 646; cf. Lloyd v. Grella, 611 N.Y.S.2d 799, 801 (N.Y. 1994) (holding statute granting military recruiters access to educational venues "on the same basis" as all other employment recruiters grants "equal access" not "unqualified access"; and upholding school board resolution barring employers, including military, who discriminated on the basis of sexual orientation from school site student recruitment). Thus, it is not a denial of "equal access," as commanded by the Act, for the School District to require that all student-initiated and student- led clubs, including a religious club, have membership and officership open, in all respects, to all Roslyn students pursuant to a nondiscrimination policy.

In this Court's view, the School District's nondiscrimination policy cannot be said to influence the form or content of the bible club's proposed religious speech and religious activities in that, as discussed herein, the School

District's policy does not unconstitutionally interfere in the club's members' and officers' determination of appropriate prayer and other religious activity, for example, "Christian fellowship," "singspiration," and "testimonies of their belief, faith, walk, experiences in or with Christ Jesus," see Constitution of the Roslyn High School Walking On Water Club (Christian Fellowship), Appendix A. The nondiscrimination policy does not impermissibly inhibit or prevent the bible club's members from selecting those students they desire to lead the club in prayer or other religious activity, contrary to plaintiffs' contentions.[14] Moreover, any claim that the policy jeopardizes the bible club's ability to be led by students freely chosen by its members arguably is counteracted by the School District's obligation to permit students to initiate and organize additional religious clubs if requested. See Mergens, 496 U.S. at 252. Should students holding religious beliefs differing from those of the bible club's members desire to conduct meetings to engage in prayer or other religious activity, they would be entitled to equal access as well, subject of course to the School District's nondiscrimination policy. Elective forces would also necessarily govern the leadership of any other religious club.

If the bible club were a distinctly private club then there

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[14] For example, plaintiffs argue that, under the EAA, "if they wanted to have an Islam club and they want only the followers of Islam to be in the officership[,] they have a right to do that and the school can't tell them they have to have Jewish students or Emily Hsu to be in that club or put in that position." Tr. 40-41. Contrary to plaintiffs' assertions, the School District, by imposing its nondiscrimination policy on the bible club, does not require that non-Christians "be an integral part of the Christian Bible Club's hierarchical structure," Pls. Mem. at 3.

would be force to plaintiffs' contention, see, e.g. Tr. 25-26, 37, that the club and its members may discriminate on the basis of religion, race, sex, etc., in their private affairs as against others. However, they are not a distinctly private group--they are a student group, which sought and was granted school-recognized access to public school facilities. Presumably, the bible club and its members intend to take advantage of the benefits attendant to equal access. It is not unreasonable to require that they also accept the conditions thereto, including the prohibition on discrimination against any Roslyn student. To allow an exemption from the nondiscrimination policy, the School District would be tolerating, if not expressly sanctioning, conduct that would be unconstitutional for it to engage in directly. See 20 U.S.C. § 4071(d)(7); see also Garnett, 987 F.2d at 645 (§ 4071(d)(7) is a " 'savings' clause that protects against reading implications into the EAA which might abridge federal constitutional rights . . . for persons . . . within its scope"). Although the parties vigorously dispute whether the student bible club and its members are state actors or a place of public accommodation if they engage in discriminatory practices through the use of public school facilities, this Court does not find those issues determinative of plaintiffs' claim. Rather, what is determinative is that it appears that the School District has provided the bible club "equal access" as the nondiscrimination policy is not aimed at suppression of religious speech or beliefs, but at furthering the School's interest in protecting the well-being of all students by ensuring equal and nondiscriminatory access of all students to student clubs.

Although plaintiffs suggest that by allowing the School

District's policy to stand the bible club risks facing "non-Christian leadership,"[15] there is no evidence in the record whatsoever that such an event is threatened or likely. Indeed, Emily Hsu and Timothy Hsu both assert that they have "not had any conversation or received any other information from any student at Roslyn High School who is not a Christian, indicating their desire to become an officer in our Christian Bible club." Emily Hsu Aff. ¶ 43; Timothy Hsu Aff. ¶ 21. Plaintiffs' speculation that the bible club may be "taken over" by "atheists" or any other students or group does not warrant the relief they seek.

As there is no basis in the record for plaintiffs' suggestion that the School District will not afford the bible club the same privileges afforded other noncurriculum-related student clubs and allow it to meet on the same terms and conditions as those other clubs, the School District appears to have satisfied its obligation under the Act of permitting

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[15] Plaintiffs suggest that the School District is "forcing the plaintiffs to face the very real eventuality that the Club will be run by students who are hostile to the plaintiffs' religious beliefs." Pls. Mem. at 17 (emphasis added). At oral argument, plaintiffs' counsel hypothesized that "if 50 students that were in this case either Christians or whatever they might be join the Christian club they could vote their candidates into officership and vote to disband the club. We don't have to wait for that harm to happen since they are requiring for the club to be recognized that we submit a constitution that meets that provision." Tr. 25. Similarly, plaintiffs assert: "For example, if the Bible Club has ten religious members and twenty atheists then join, under the Roslyn School Board policy, the atheists would be entitled to take over the club and (and presumably, subdue) its religious functions. Because Evangelical Christian students are a minority at Roslyn High School, this scenario is a distinct possibility." Pls. Mem. at 9 (emphasis added).

religious speech and religious activities on a nondiscriminatory basis.

Accordingly, plaintiffs have failed to demonstrate a likelihood of success or sufficiently serious questions as to whether the nondiscrimination policy, as applied to the bible club, violates the EAA.[16]

2. First and Fourteenth Amendment and RFRA Claims

It is well recognized that "students [do not] shed their constitutional rights . . . at the schoolhouse gate." Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (upholding rights of secondary school students to wear armbands protesting Vietnam War); see also Hazelwood Sch.

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[16] Plaintiffs also claim that the School District's requirement that the bible club submit a constitution "was created by the School Board just to impede the formation of the Bible Club," as evidenced by a February 10, 1994 memorandum from Principal Rubin to Roslyn High School Clubs, which plaintiffs maintain shows that up until that date, no club was required to submit a constitution. Pls. Mem. at 10. Plaintiffs urge that the School District may not impose the nondiscrimination policy on the bible club because of defendants' "past discrimination" against the club. Id. at 11. Defendants maintain that the School District gave plaintiffs' request to form the club proper attention, as they needed adequate time and information to determine the School District's obligations regarding the request. Tassone Aff. ¶¶ 4-24. In addition, defendants assert that "student clubs typically have written constitutions," consistent with a recommendation by the Commission on Secondary Schools of the Middle States Association of Colleges and Schools--of which the School District is a member--that all student clubs have a constitution. Id. ¶ 11. When the School District became aware that "a few established clubs do not have or could not locate constitutions," those clubs were requested to submit constitutions. Id. Based on the present record, plaintiffs' conclusory allegation of "past discrimination" by the School District appears to be of little merit.

Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988). Whether in school or out of school, students are "persons" under the Constitution. Tinker, 393 U.S. at 511. As such,

> [t]hey are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State . . . . The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects . . ., if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.

Id. at 511-13. It is indisputable that the "Fourteenth Amendment protects the rights of students against encroachment by public school officials." New Jersey v. T.L.O., 469 U.S. 325, 340-342 (1985). Thus, the Supreme Court reiterated in T.L.O.:

> The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures--Boards of

> Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Id. at 334, (quoting West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

Nevertheless, students' constitutional rights are "not automatically coextensive with the rights of adults in other settings." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986). Thus, the Court has recognized the propriety of restrictions on a student's First Amendment rights in the school setting, particularly where the student's "speech or action . . . intrudes upon the work of the schools or the rights of other students." Tinker, 393 U.S. at 508, see, e.g., Kuhlmeier, 484 U.S. at 266 (holding school need not tolerate student speech inconsistent with educational mission of school, even though government could not censor similar speech outside school context); Fraser, 478 U.S. at 685-86 (holding secondary school student could be disciplined for delivering sexually explicit, but not legally obscene, speech at school assembly); T.L.O., 469 U.S. at 340-42 (holding "school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject").

The religion clauses of the First Amendment, as applied to the states--here, the School District--through the Fourteenth Amendment, see Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), provide that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. These clauses mean that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." Lee v. Weisman, 112 S.Ct. 2649, 2654 (1992). The First Amendment "requires the state to be neutral in its relations with groups of believers and non-believers; it does not require the state to be their adversary. State power is no more to be used to handicap religions than it is to favor them." See Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

Under the Establishment Clause "total separation is not possible in an absolute sense, [for] [s]ome relationship between government and religious organizations is inevitable." Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); Catholic High Sch. Ass'n of Archdiocese of New York v. Culvert, 753 F.2d 1161, 1166 (2d Cir. 1985). Rather, "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending upon all the circumstances of a particular relationship." Lemon, 403 U.S. at 614; Culvert, 753 F.2d at 1166. In other words, the Constitution does not require "complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." Lynch v. Donnelly, 465 U.S. 668, 673 (1984). Indeed, through accommodation "of all faiths and all forms of religious expression" our government has " 'respect[ed] the religious

nature of our people.' " Id. at 677-78 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

To facilitate analysis of an Establishment Clause claim, the Supreme Court has applied a now-familiar three-pronged test. To satisfy the Establishment Clause, a governmental policy--here, the School District's nondiscrimination policy--must (1) have a secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not foster an excessive government entanglement with religion. Lemon, 403 U.S. at 612; see also Widmar v. Vincent, 454 U.S. 263, 271 (1981); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772-73 (1973); see, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269, 282 (4th Cir.) (applying Lemon test to university policy excluding religious activities from eligibility for student activities funds), cert. granted, 115 S.Ct. 417 (1994); DeMarco v. Holy Cross High Sch., 4 F.3d 166, 168 (2d Cir. 1993) (applying Lemon test to determine whether Age Discrimination in Employment Act applies to action brought by lay teacher against his parochial school employer).

Plaintiffs do not dispute that the nondiscrimination policy satisfies the first prong of the Lemon test. A nondiscrimination policy undeniably has a secular purpose of advancing the school educational mission free of discriminatory influence. Cf. Mergens, 496 U.S. at 248 ("Congress' avowed purpose--to prevent discrimination against religious and other types of speech--is undeniably secular."); Rosenberger, 18 F.3d at 284 (enforcement of nondiscrimination policy advances the "secular purpose" of avoiding an

establishment of religion at school). It seems clear the School District's policy was not motivated wholly by religious considerations, Wallace v. Jaffree, 472 U.S. 38, 56 (1985); Lynch, 465 U.S. at 680, nor does the policy evince an intent to promote or inhibit a particular point of view in religious matters, see Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987).

Rather, plaintiffs argue that the School District's nondiscrimination policy requiring "open officership without reference to religion and creed," Pls. Mem. 11-12, violates the second and third prongs of the Lemon test. Plaintiffs argue that the effect of the nondiscrimination policy on the bible club is to inhibit plaintiffs' exercise of their religious beliefs, particularly in their choice of the club's leaders, and that the School District will inevitably "invasively monitor the religious activities" of the club to ensure enforcement of the policy. Id. at 3, 11-16.

School-time religious activities at public school facilities are offensive to the Establishment Clause, particularly because of the public school's unique place in American life. See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 216-17 (1948) (Frankfurter, J., concurring); see also Lee v. Weisman, 112 S.Ct. 2649, 2655-59 (1992); see generally Laurence H. Tribe, American Constitutional Law § 14-5, at 1174-75 (2d ed. 1988) (hereinafter "Tribe") ("School is the forum through which basic norms are transmitted to our young, as well as a 'most vital

civic institution for the preservation of a democratic system of government.' When government permits a religion to take over part of a public school's facilities during the school day, it strongly implies official endorsement of the particular religion." (quoting Schempp, 374 U.S. at 230, (Brennan, J., concurring))). On the other hand, nonschool-time religious activities at school facilities by student-initiated and student-led groups convey no message of official endorsement, and typically would not offend the Establishment Clause. See Mergens, 496 U.S. at 252 ("A school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion.");[17] see also Tribe § 14-5, at 1175. During nonschool hours students may voluntarily elect not to participate in student-initiated and student-led religious activities, just as they generally may elect not to participate in other available noncurriculum-related student activities. Coercion is not inherent in this context because students who wish not to participate in a student-initiated and student-led religious activity may freely choose not to. Mergens, 496 U.S. at 251 ("[T]here is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate.").

However, this case does not involve endorsement by

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[17] The Mergens Court emphasized the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 496 U.S. at 250 (emphasis in original).

school authorities of religious activities occurring during the mandated school day or at mandated school events. Nor does it involve coercion of students to participate in a student-initiated and student-led religious activity. Rather, this case raises concerns as to the rights of students not to be excluded from participating, in all respects, in a nonschool-time student-initiated and student-led religious activity based solely upon their religious beliefs. Just as a message of exclusion is conveyed where school officials refuse to let a student religious group use school facilities during nonschool hours, but allow other noncurriculum-related groups to meet during that time, see Mergens, 496 U.S. at 248-50, a message of exclusion is conveyed where school officials permit discrimination against students by allowing--through exemption from a neutral and generally applicable policy--a student religious club to condition eligibility to run for office upon students' religious beliefs. Just as "racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals," Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983), so too does discrimination based on religion in the school setting. That students' religious beliefs and expressions may exist within a wholly private sphere, see Lee, 112 S.Ct. at 2656, does not prevent the School District from imposing a facially neutral nondiscrimination policy on all student clubs to protect the rights of all students to be free from discrimination.

By enforcing its policy, the School District does not convey or attempt to convey a message that religion or particular religious beliefs are favored or disfavored, something school officials may not do. See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217, 2226 (1993);

Wallace, 472 U.S. at 70 (O'Connor, J., concurring in the judgment). The application of this nondiscrimination policy to a broad spectrum of student clubs, as well as to a broad spectrum of school life, is an important index of the policy's secular effect--elimination and prevention of invidious discrimination in Roslyn's public schools. Contrary to plaintiffs' contentions, see Pls. Mem. at 15, by applying its nondiscrimination policy to all school clubs, the School District does not impermissibly inhibit religion or particular religious beliefs or expression. The policy does not require that students of any particular religious denomination or nondenomination or students holding particular religious beliefs be selected as officers to lead the club, contrary to plaintiffs' contention. Rather, the bible club's members apparently are provided unfettered opportunity to express their religious beliefs and engage in religious activity and may freely choose those students they believe should lead them in prayer and other religious activities. Accordingly, the nondiscrimination policy does not have a principal or primary effect that inhibits religion.

As for the third prong of the Lemon test, plaintiffs contend that the School District made the "structure" of the bible club a "secular issue" by imposing the nondiscrimination policy on the bible club, resulting in excessive entanglement of the school "with church affairs." Pls. Mem. at 14. To the contrary, the nondiscrimination policy as applied to the bible club does not foster an excessive government entanglement with religion; rather it avoids excessive entanglement between and among the School District and student members of the bible club over religious issues. If all students are entitled to be

members and hold office in the bible club regardless of religious beliefs, then there would be no reason for the School District to become involved in the members' determination of their officers. Under these circumstances, if a student claims to have been excluded from seeking office in the bible club on the basis of religious beliefs, the School District may be called upon to determine only the basis for the exclusion, not the genuineness, truthfulness or validity of that particular student's or any other students' religious beliefs. By requiring that all students be entitled to run for office regardless of religious beliefs, a student not selected to office would have no basis to challenge the other students' determination. If the nondiscrimination policy is not imposed, then the School District would conceivably be called upon by excluded students to determine if those students' beliefs are sufficient for them to run for office. These circumstances would pose a greater, and unavoidable, risk of excessive entanglement by the School District with religious issues. Clearly, the School District may not serve as an arbiter of the truthfulness or validity of any student's religious beliefs. See DeMarco, 4 F.3d at 170. Accordingly, the Establishment Clause is not violated by the School District imposing the nondiscrimination policy on the bible club.

Plaintiffs also claim that the School District infringed their rights under the Free Exercise Clause. In this respect, plaintiffs assert that the School District has restrained them from meeting and engaging in religious activity, by refusing to "accommodate" their sincerely held religious beliefs that "leadership positions should be held only by those whose sincerely-held religious beliefs reflect the values of, and a

regard for, the Bible club's stated purpose pursuant to Article II §§ 1-4 of the constitution, i.e., perpetuating and encouraging Christian ideals." Emily Hsu Aff. ¶ 31; Timothy Hsu Aff. ¶ 9. Plaintiffs argue that the School District has impermissibly imposed preconditions on their exercise of religious beliefs, thereby violating plaintiffs' constitutional rights.

The Supreme Court has long held that the Free Exercise Clause is an absolute prohibition against governmental regulation of religious beliefs. Employment Div., Dep't. of Human Resources v. Smith, 494 U.S. 872, 877 (1990); Bob Jones Univ., 461 U.S. at 603; Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (citing Cantwell, 310 U.S. at 303). The government may

> not compel affirmation of religious belief, see Torcaso v. Watkins, 367 U.S. 488 (1961), punish the expression of religious doctrines it believes to be false, United States v. Ballard, 322 U.S. 78, 86-88 (1944), impose special disabilities on the basis of religious views or religious status, see McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953); cf. Larson v. Valente, 456 U.S. 228, 245 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, see Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445-52 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95-119 (1952); Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-25 (1976).

Smith, 494 U.S. at 877; Sherbert v. Verner, 374 U.S. 398, 402 (1963). Moreover, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." Sherbert, 374 U.S. at 405; see also Rosenberger, 18 F.3d at 279 ("Unconstitutional conditions, which make enjoyment of a governmental benefit contingent on sacrifice of an independent constitutional right, are prima facie invalid.").[18] "Whether a condition is unconstitutional depends on whether the government may properly demand sacrifice of the particular right asserted in the context of its exercise." Rosenberger, 18 F.3d at 279.

Plaintiffs assert their free exercise challenge under the recently-enacted RFRA, which provides that all free exercise of religion challenges be guided by the "compelling state interest" test. See 42 U.S.C. § 2000bb-1.[19] Under this test, the

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[18] As the Supreme Court stated in Perry v. Sindermann, 408 U.S. 593 (1972):

> [I]f the government could deny a benefit to a person because of his constitutionally protected speech . . ., his exercise of th[at] freedom [ ] would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

Id. at 597.

[19] Section 2000bb-1 provides:

(a) In general

Government shall not substantially burden a person's

government may justify a law burdening the free exercise of religion if it employs the least restrictive means of achieving a compelling state interest. Id. § 2000bb-1(b); see, e.g., Thomas v. Review Board of Indiana Employment Security Div., 450 U.S. 707, 718 (1981); Sherbert, 374 U.S. at 406-07.[20]

> exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be government by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-1.

[20] This test had been applied to free exercise of religion claims prior to the Supreme Court's decision in Smith, supra. In Smith, the Supreme Court held that a state could prohibit sacramental peyote use (and deny unemployment benefits to a person discharged for such use), by application of a neutral, generally applicable regulatory law forbidding such activity. Smith, 494 U.S. at 876-90. The Court in Smith determined that

This Court does not agree with plaintiffs that the School District must "accommodate" their sincerely held religious beliefs by exempting the bible club from its facially neutral nondiscrimination policy. Even assuming that application of the nondiscrimination policy actually burdens plaintiffs' freedom to exercise religious beliefs, a very minimum for exemption from the policy, see Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 303 (1985), by exempting

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a neutral and generally applicable law that has an incidental effect of burdening a person's exercise of religion by requiring (or forbidding) conduct that the person's religious belief forbids (or prescribes) need not be justified by a compelling state interest. See id. at 878-89, see also Church of Lukumi Babalu Aye, Inc., 113 S.Ct. at 2226. The Court concluded that "the sounder approach, and the approach in accord with a vast majority of our precedents, is to hold the [compelling interest] test inapplicable to such challenges." Smith, 494 U.S. at 885. Although Smith involved a criminal statute, its holding has been applied to civil statutes as well. See, e.g., Rector, Wardens, & Members of the Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 353-56 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991). However, the Court in Smith suggested that the compelling state interest test would apply in cases involving the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech or freedom of association, so-called "hybrid situations." 494 U.S. at 881-82. Nevertheless, the RFRA restored the compelling state interest test in all free exercise of religion challenges, and provided a claim for persons whose free exercise rights are substantially burdened by government. See 42 U.S.C. § 2000bb. As Congress explicitly stated: "The purposes of this chapter are--(1) to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." Id. Defendants do not challenge the constitutionality of the RFRA or the applicability of the compelling state interest test. In any event, this Court need not address these issues because, as discussed below, plaintiffs have failed to make the requisite showing for preliminary injunctive relief even under the compelling state interest test.

the club from the policy the School District would not be lifting a regulation merely that burdens plaintiffs' exercise of religion, but one that ensures all other students the right to be free from invidious discrimination in school. The School District' interest, whether arising under federal or New York law, in eliminating and preventing religious discrimination in school certainly may be characterized as "compelling." The School District cannot accommodate the bible club without ignoring the collision between plaintiffs' constitutional rights and the rights of other Roslyn students to be free from discrimination in school, whether in a curriculum or noncurriculum-related school-recognized student activity. Where, as here, discrimination by the bible club on the basis of religion would "impinge upon the rights of other students," Tinker, 393 U.S. at 506, the School District should be permitted to enforce its nondiscrimination policy against all clubs to protect the rights and well-being of all students; a school-recognized club that is permitted to discriminate on the basis of religion likely would be disruptive to the educational mission of the school. It is doubtful that this compelling interest can be achieved by any significantly less restrictive means than an outright ban on discrimination, and plaintiffs suggest none. Significantly, the School District's nondiscrimination policy is unrelated to the suppression of religious beliefs and expression, and does not prevent the bible club's student members from selecting those students they desire to lead the club in pryer or other religious activity. Based on the record presented thus far, it appears that plaintiffs' enjoyment of a governmental benefit (i.e., access to the school's facilities) is not being unconstitutionally conditioned upon plaintiffs' foregoing constitutionally protected religious beliefs or expression. Accordingly, the Free

Exercise Clause does not mandate the special treatment to which plaintiffs claim they are entitled.

Plaintiffs assert a claim for violation of their free speech rights. See Amended Complaint ¶¶ 69-73. To the extent plaintiffs claim that imposition of the nondiscrimination policy to the bible club violates plaintiffs' free speech rights, this claim is of doubtful merit.[21] The policy apparently is not aimed at the suppression of speech and does not distinguish prohibited from permitted activity on the basis of content or viewpoint of speech; moreover, the compelling interest it seeks to further--elimination and prevention of invidious discrimination of Roslyn students--likely cannot be achieved by any significantly less restrictive means.

Plaintiffs also claim that the nondiscrimination policy infringes their rights to freedom of association, a separate and distinct right emanating from the First Amendment. See Roberts v. United States Jaycees, 468 U.S. 609, 622-23 (1984); Healy v. James, 408 U.S. 169, 181 (1972); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-61 (1958). The right to associate for expressive purposes, however, is not

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[21] This claim appears to be based primarily on plaintiffs' contention that defendants purposefully delayed determining their request for recognition of the bible club, and imposed unlawful obstacles to the formation of the club (presumably referring to the requirement of a written constitution and the imposition of the nondiscrimination policy) because of the religious content and viewpoint of plaintiffs' speech. Id. ¶ 70. Plaintiffs also assert equal protection and due process claims based on these allegations. See id. ¶¶ 95-97 and ¶ 101. To the extent plaintiffs base these claims on allegations of "past discrimination" these claims appear to have little merit.

absolute. See Roberts, 468 U.S. at 623. Rather, as the Supreme Court recognized in Roberts:

> Infringements on that right may be justified by regulations adopted to serve compelling state interests unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms.

Id.

Plaintiffs' counsel argues that the bible club is a distinctly "private group." Transcript of Oral Argument ("Tr.") 26. As a "private group," plaintiffs' counsel urges that the club clearly may discriminate based on religion. Plaintiffs' counsel suggests, by example, that "a Jewish students' club could meet and say we don't want Ms. Hsu to be the president of our club or to be a member of our club or to be an officer of the club, certainly they have the right to do that." Tr. 25-26. In response to questioning from the Court, plaintiffs' counsel further argued that the bible club could even discriminate as to membership and officership on bases other than religion. In this respect, plaintiffs' counsel asserted that the bible club could, for instance, exclude black students if it "believes that blacks should not be part of their group." Tr. 37. Defendants, on the other hand, argue that the bible club is not a "distinctly private club, but one open to the general student population and exclusively associated with a public facility. As a result, it must comply with federal and state laws which prohibit discrimination." Defs. Mem. at 32; see also Tr. 16-17, 41 ("[T]he Christian religion club at Roslyn High School is not a

private church, it's not a private synagogue, which is the analogy the [plaintiffs' counsel] has arrived upon.").

By characterizing their club as a "private group" free to discriminate on any basis it chooses, plaintiffs ignore the obvious--the bible club is a "student club." As such, the School District may subject the bible club and its members to reasonable school regulations aimed at preventing interference with the opportunities and rights of other students. See Tinker, 393 U.S. at 506, cf. Healy, 408 U.S. at 188-89 & n. 20. ("In the context of the 'special characteristics of the school environment,' the power of the government to prohibit 'lawless action' is not limited to acts of a criminal nature. Also prohibitable are actions which 'materially and substantially disrupt the work and discipline of the school.' Associational activities need not be tolerated where they infringe reasonable campus rules . . . ." (quoting Tinker, 393 U.S. at 506, 513). To the extent the nondiscrimination policy may burden plaintiffs' and the bible club's members' freedom to select leaders of their own choosing, imposition of the policy appears justified by the School District's compelling interest in eliminating and preventing discrimination against Roslyn students, a goal that, under the circumstances, likely cannot be achieved by any significantly less restrictive means. The policy apparently is not aimed at the suppression of speech, is applied to all student clubs as a condition to access, and does not distinguish prohibited from permitted activity on the basis of content or viewpoint of speech.

Accordingly, plaintiffs have failed to demonstrated a likelihood of success or sufficiently serious questions as to

whether the nondiscrimination policy, as applied to the bible club, violates the First and Fourteenth Amendments or the RFRA.

III. CONCLUSION

For the reasons above, plaintiffs' motion for a preliminary injunction is denied, and defendants' cross-motion for judgment on the pleadings is denied without prejudice to their right to move for summary judgment following discovery.

SO ORDERED.

/s/ Leonard D. Wexler
LEONARD D. WEXLER
UNITED STATES DISTRICT COURT

Dated: Hauppauge, New York
February 21, 1995

APPENDIX A. [To the District Court Decision]

Constitution of the Roslyn High School
Walking On Water Club
(Christian Fellowship)

Article I--Student Organization

Section I: This student organization will be known as the Walking on Water club of Roslyn High School.

Section II: Meetings are open to all and limited to only

Roslyn High School students regardless of race, color, age, religion, sex, national origin, or physical handicap.

Article II--Purpose

Section I: This club will provide a time of praise for students to gather in Christian fellowship.

a. Christian fellowship is when Christians gather to praise God, to encourage one another, to strengthen their walk with the Lord in dealing with life's problems, and to enjoy each other's company.

Section II: This club will provide fellowship in the form of singspiration.

a. Singspiration is singing inspirational music which exalts the Lord Jesus Christ and creates a sense and spirit of unity among those singing.

Section III: This club will allow students to share and/or to give testimonies of their belief, faith, walk, experiences in or with Christ Jesus.

Section IV: This club would like to spread the Good News of God and His word.

a. God's word is the Bible which Christians live by.

b. The Bible will be used in study in order that people may learn about it.

Section V: This club would like to bring a positive atmosphere to the student body of Roslyn High School in which students may learn and see the

aspects and beliefs of Christianity.

Article III--Meetings

Section I: Meetings will be held once a week after school. A typical meeting would be as follows:

a. Meetings would be opened with a prayer.

b. Singspiration would be led by a student for approximately half an hour.

c. The next 25 minutes would be designated to a specific activity for that meeting. These activities can include guest speakers, more singspiration, dramas/skits, videos/audio, sharing, games, prayer discussions, and Bible studies.

--non-school persons, including guest speakers, may not direct, conduct, control or regularly attend meetings.

d. Meetings would be closed with a prayer.

Article IV--Potential Projects

Section I: Potential projects of the club can include outings, picnics, community service/volunteer work, and fund raising for charity.

Article V--Elections and Officers

Section I: Elections will take place in the May of the preceding year. Officers shall assume their

designated responsibilities on a full-time basis in the September of the following school year.

a. Voter for the officers will be those who have attended at least 2/3 of the meetings for that school year.

Section II: Officers must be professed Christians either through baptism or confirmation.

Section III: The positions to be filled will be President, Vice President, Secretary, Music Coordinator, and Activities Coordinator.

Section IV: Any officer who is remiss in his/her duties may be impeached. When impeachment of an officer is brought to attention, the remaining four officers will review the situation and vote for or against impeachment.

Article VI--Miscellaneous

Section I: The official verse of Walking On Water will be Hebrew 10:25, "Let us not give up meeting together, as some are in the habit of doing, but let us encourage one another--and all the more as you see the Day approaching."

Article VII--Amendments

Section I: Amendments will be made to this constitution whenever deemed necessary.

* * *

APPENDIX B. [To the District Court Decision]

MARCH 10, 1994 RESOLUTION

. . .

WHEREAS, the Roslyn Union Free School District has always supported the principle of a free public education, as well as the separation of Church and State, constitutionally guaranteed to all; and

WHEREAS, the Roslyn Union Free School District has opposed organized prayer in the public schools; and

WHEREAS, we are concerned that the formation of a religious club could lead to the feeling on the part of some students that they would be excluded or ostracized if they failed to participate in any organized prayers at such a religious club; and

WHEREAS, the Federal Equal Access Act of 1984, as upheld and interpreted by the United States Supreme Court in 1990, requires public secondary schools that receive Federal financial assistance to allow student religious clubs to meet on school premises during non-school hours on the same voluntary basis as other non-curriculum-related student clubs; and

WHEREAS, we have received an application from a group of our high school students for approval of the formation of a student Christian religious club; and

WHEREAS, it is the adopted written policy and past practice of the District that all students should be permitted to

participate in and have access to all student clubs on an equal basis and to the fullest extent as they may choose, regardless of their race, color, creed, sex, national origin, religion, age, marital status or disability; and

WHEREAS, discrimination by a student club which limits a student's full participation in club activities because of the student's creed or religious beliefs would be detrimental to the education, welfare and well-being of the students attending the District's schools.

NOW, THEREFORE, BE IT RESOLVED that we hereby approve the formation of said high school student Christian religious club on the following conditions:

1. Membership in the Club shall be limited to Roslyn High School students, and no student shall be discriminated against or excluded from participating in or having access to the Club, including without limitation entitlement to be an officer of the Club, on the basis of creed or religion.

2. A Roslyn faculty member shall be assigned as a monitor to the Club in a non-participatory capacity only.

3. Non-school persons may not direct, conduct, control or regularly attend activities of said Club.

4. The Club shall be allowed to meet on school premises, but only during non- school hours.

5. In accordance with the Federal Equal Access Act, no public funds will be expended to support the Club or its activities beyond the incidental cost of providing meeting space and compensation for a monitor.

IT IS HEREBY FURTHER RESOLVED that the Superintendent of Schools is hereby directed to cause all listings, communications and announcements issued by the District pertaining to said Club expressly to state that the Roslyn School District does not endorse the Club, but is mandated by the Federal Equal Access Act to permit the Club's activities, same to be on a voluntary basis and to be held on school premises during non-school hours only.

* * *

APPENDIX D

SUBCHAPTER VIII - EQUAL ACCESS

§4071. Denial of equal access prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that--

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school government are

present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof--

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Federal financial assistance to schools unaffected

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United

States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

§ 4072. Definitions

As used in this subchapter--

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

§ 4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

§ 4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

APPENDIX E

EQUAL OPPORTUNITY

The Board, its officers and employees will not discriminate against any student, employee or applicant for employment on the basis of race, color, national origin, creed or religion, marital status, sex, age or handicapping condition.

This policy of nondiscrimination includes: access by students to educational programs, counseling services for students, course offerings and student activities, recruitment and appointment of employees and employment pay and benefits.

Ref: Title VI, Civil Rights Act of 1964
Title VII, Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972
Executive Order 11246, as amended by E.O. 11375
Equal Pay Act, as amended by the Education Amendments of 1972
Title IX, Education Amendments of 1972
Rehabilitation Act of 1973
Education for All Handicapped Children Act of 1975

EQUAL EDUCATIONAL OPPORTUNITIES

The district shall provide every student with equal educational opportunities regardless of race, color, creed, sex, national origin, religion, age, marital status or disability.

No student will be excluded on such basis from participating in or having access to any course offerings, athletics, counseling, employment assistance, extracurricular activities or other school resources.

Ref: 1972 Educational Amendments, Title IX; 45 CFR Part 86
1964 Civil Rights Act, Title VI;
1973 Rehabilitation Act, Sections 503 and 504; 45 CFR Part 84;
Brown v. Board of Education, 347 U.S. 483 (1954)
Executive Order 11246 as amended

APPENDIX F

Constitution of the Roslyn High School
Walking on Water Club
(Christian Fellowship)

Article 1 - Student Organization

Section I: This student organization will be known as the Walking On Water club of Roslyn High School.

Section II: Meetings are open to all and limited to only Roslyn High School students regardless of race, color, age, religion, sex, national origin, or physical handicap.

Article II - Purpose

Section I: This club will provide a time of praise for students to gather in Christian fellowship.

a. Christian fellowship is when people gather to praise God, to encourage one another, to strengthen their walk with the Lord in dealing with life's problems, and to enjoy each other's company.

Section II: This club will provide fellowship in the form of singspiration.

a. Singspiration is singing inspirational music which exalts the Lord Jesus Christ and creates a sense and spirit of unity among those singing.

Section III: This club will allow students to share and/or to give testimonies of their belief, faith, walk, experiences in or with Christ Jesus.

Section IV. This club would like to spread the Good News of God and His word.

a. God's word is the Bible which Christians live by.

b. The Bible will be used in study in order that people may learn about it.

Section V: This club would like to bring a positive atmosphere to the student body of Roslyn High School in which students may learn and see the aspects and beliefs of Christianity.

Article III - Meetings

Section I: Meetings will be held once a week after school. A typical meeting would be as follows:

a. Meetings would be opened with a prayer.

b. Singspiration would be led by a student for approximately half and hour.

c. The next 25 minutes would be designated to a specific activity for that meeting. These activities can include guest speakers, more singspiration, dramas/skits, video/audio, sharing, games, prayer, discussions, and Bible studies.

-non-school persons, including guest speakers, may not direct, conduct, control or regularly attend meetings.

d. Meeting would be closed with a prayer.

Article IV - Potential Projects

Section I: Potential projects of the club can include outings, picnics, community service/volunteer work, and fund raising for charity.

Article V - Elections and Officers

Section I: Elections will take place in the May of the preceding year. Officers shall assume their designated responsibilities on a full-time basis in the September of the following school year.

a. Voter for the officers will be those who have attended at least 2/3 of the meetings for that school year.

Section II: Officers must be professed Christians either through baptism or confirmation.

Section III: The positions to be filled will be President, Vice President, Secretary, Music Coordinator, and Activities Coordinator.

Section IV: Any officer who is remiss in his/her duties may be impeached. When impeachment of an officers is brought to attention, the remaining four officers will review the situation and vote for or against impeachment.

Article VI - Miscellaneous

Section I: The official verse of Walking on Water will be Hebrew 10:25, "Let us not give up meeting together, as some are in the habit of doing, but let us encourage one another - and all the more as you see the Day approaching."

Article VII - Amendments

Section I: Amendments will be made to this constitution whenever deemed necessary.

APPENDIX G

WHEREAS, the Roslyn Union Free School District has always supported the principle of a free public education, as well as the separation of Church and State, constitutionally guaranteed to all; and

WHEREAS, the Roslyn Union Free School District has opposed organized prayer in the public schools; and

WHEREAS, we are concerned that the formation of a religious club could lead to the feeling on the part of some students that they would be excluded or ostracized if they failed to participate in any organized prayers at such a religious club; and

WHEREAS, the Federal Equal Access Act of 1984, as upheld and interpreted by the United States Supreme Court in 1990, requires public secondary schools that receive Federal financial assistance to allow student religious clubs to meet on school premises during non-school hours on the same voluntary basis as other non-curriculum-related student clubs; and

WHEREAS, we have received an application from a group of our high school students for approval of the formation of a student Christian religious club; and

WHEREAS, it is the adopted written policy and past practice of the District that all students should be permitted to participate in and have access to all student clubs on an equal basis and to the fullest extent as they may choose, regardless of

their race, color, creed, sex, national origin, religion, age, marital status or disability; and

WHEREAS, discrimination by a student club which limits a student's full participation in club activities because of the student's creed or religious beliefs would be detrimental to the education, welfare and well-being of the students attending the District's schools.

NOW, THEREFORE, BE IT RESOLVED that we hereby approve the formation of said high school student Christian religious club on the following conditions:

1. Membership in the Club shall be limited to Roslyn High School students, and no student shall be discriminated against or excluded from participating in or having access to the Club, including without limitation entitlement to be an officer of the Club, on the basis of creed or religion.

2. A Roslyn faculty member shall be assigned as a monitor to the Club in a non-participatory capacity only.

3. Non-school persons may not direct, conduct, control or regularly attend activities of said Club.

4. The Club shall be allowed to meet on school premises but only during non-school hours.

5. In accordance with the Federal Equal Access Act, no

public funds will be expended to support the Club or its activities beyond the incidental cost of providing meeting space and compensation for a monitor.

IT IS HEREBY FURTHER RESOLVED that the Superintendent of Schools is hereby directed to cause all listings, communications and announcements issued by the District pertaining to said Club expressly to state that the Roslyn School District does not endorse the Club, but is mandated by the Federal Equal Access Act to permit the Club's activities, same to be on a voluntary basis and to be held on school premises during non-school hours only.

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

EMILY HSU, by and through her next friend, DR. CHIN-CHING HSU; and TIMOTHY HSU, by and through his next friend, DR. CHIN-CHING HSU,

Plaintiffs,

-against-

ROSLYN UNION FREE SCHOOL DISTRICT NO. 3, MICHAEL BARKAN, in his officially capacity, as President of the Roslyn Union Free School District Board of Education; ASENATH ANDERSON, in her official capacity as Vice President of the Board of Education; WILLIAM COSTIGAN; BARBARA SCHWARTZ; PAT SCHISSEL; ELLEN SEIGEL; ALVIN SILVERMAN, in their official capacities as members of the Roslyn Union Free School District Board of Education; DR. FRANK TASSONE, in his official capacity as Superintendent of Roslyn Union Free School District, MARILYN SILVERMAN, in her official capacity as Assistant Superintendent of Roslyn Union Free School District, MARK WEYNE, in his official capacity as Principal of Roslyn High School, and DR. HOWARD RUBIN, in his official capacity as Principal of Roslyn High School,

Defendants.

----------x

AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO FED. R. CIV. P. 12 (c)

CV 94-0659

(Wexler, D.J.)

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

DR. FRANK TASSONE, being duly sworn deposes and says:

1. I am the Superintendent of the Roslyn Union Free School District (hereinafter, "District") and one of the named defendants in the above captioned action. As Superintendent, I am the chief administrative officer of the District and am responsible for overseeing the day-to-day operations of the District and for implementing the policies established by the Board of Education (hereinafter "Board"). I have extensive experience in the area of primary and secondary education. I hold a doctorate and other advanced degrees in Educational Administration, as well as a New York State teaching license for a secondary school. Prior to my current appointment as Superintendent for the Roslyn School District, I served in varying capacities in other school districts, including Superintendent, Assistant Superintendent for Curriculum, Assistant Principal or Principal at the elementary,

middle school and high school level and as a teacher at the secondary school level. I am fully familiar with the matters raised in this litigation. I submit this affidavit in opposition to the plaintiffs' motion for a preliminary injunction[1] and in support of defendants' cross-motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c).

2. The gravamen of plaintiffs' motion is that the District has improperly restricted plaintiffs' formation of an on campus, student Christian religion club. Plaintiffs argue that they are entitled to "equal access" to school facilities and to be treated in the same manner as the other noncurriculum clubs which are allowed to meet on school property. As discussed below (¶¶ 30-35), what plaintiffs, in reality, are seeking is not equal treatment, but special treatment, which would allow their club to unlawfully discriminate against other Roslyn High School students by restricting their participation in the club based upon their religious beliefs. The Board has approved the formation of plaintiffs' club with the proviso that it may not condition participation in the club's activities based upon a student's religious beliefs. All clubs at the High School are open to all members of the student body. No club, whether curriculum or noncurriculum related, is permitted to limit a student's full participation in the club's activities because of the

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[1] Although plaintiffs' notice of notice is denominated "Notice of Motion for a Preliminary Injunction", the motion itself is entitled "Motion for A Preliminary and Permanent Injunction". Plaintiffs are moving pursuant to Fed. R. Civ. P. 65(a). I am advised by counsel that this rule applies to preliminary injunctions only and not an ultimate decision on the merits which would be required for granting permanent injunctive relief. Consequently, it appears that plaintiffs' motion, at this juncture, is only for a preliminary injunction and not a permanent one.

students' religion. Allowing plaintiffs to establish a club which expressly discriminates against students based on their religion would be divisive, disruptive to the educational mission of the District and detrimental to the well-being of the student population who are entrusted to the District's care. In addition, and as discussed in the accompanying memorandum of law, such action would violate the Establishment Clause of the Constitution, as well as other federal and state constitutional and statutory provisions.

BACKGROUND

3. The Roslyn Union Free School District, located in Nassau County, New York, has a student population of approximately 2,600. Approximately 775 students attend the District's public high school. Emily Hsu and Timothy Hsu are students at the High School.

4. On September 29, 1993, Emily Hsu met with the then principal of the High School, Mark Weyne, and told him that she wanted to start a "Christian Fellowship" club. Mr. Weyne informed her that he would attempt to find out whether such a school club was permissible at the school.

5. Miss Hsu's request was referred to Marilyn Silverman, the District's Assistant Superintendent for Curriculum and Instruction. Ms. Silverman met with Miss Hsu on November 17th and 23rd to discuss the club and its proposed activities. At the meetings, Miss Hsu was advised of the process involved in starting a club and that the club, as is the case with all new clubs, would have to be approved by the

Board.

6. The process for starting a new club is the same for all students. A student's request for a new club is made to the principal of his or her school. The request is then forwarded to the central administration and typically referred to Ms. Silverman. A general inquiry is then made as to the purpose and proposed activities of the club to ascertain whether they are lawful and to make certain that they would not be disruptive to the District's educational programs or detrimental to the health, safety and well-being of the student community. An inquiry is also made to determine whether a similar club already exists and whether the proposed student club would, in actuality, be controlled or directed by outsiders who are not members of the student body. Availability of a faculty advisor is also considered since each student club is required to have an advisor. Assuming everything appears satisfactory, a written proposal for the club is then submitted to the Board for its consideration.

7. After meeting with Ms. Silverman, Miss Hsu was informed that the Board was scheduled to hold its next public meeting on December 2, 1993. Miss Hsu was invited to attend the public meeting and address the Board, if she wished, regarding her request for a new club.

8. Miss Hsu attended the December 2nd Board meeting and was permitted to address the members regarding her proposed club. This was the first time that a request for the establishment of a religious club at the High School had been presented to the Board at a public meeting and the Board

members, as is their rights, engaged in a broad ranging discussion of the issue. No formal action by the Board was taken at the meeting. The Board, instead, requested additional information about the activities of the proposed club. Also, additional time was needed to ascertain the District's legal obligations with respect to the request. It was made clear at the meeting, however, that the matter would be given prompt consideration.

9. On December 21, 1993, Ms. Silverman and Howard Rubin, the new high school principal, met with Miss Hsu regarding the club. Ms. Silverman advised her that no decision had yet been made by the Board.

10. Miss Hsu was told that although no official action had yet been taken by the Board, that there was a good possibility that the Board would approve the club. She was, therefore, requested to prepare and submit a written constitution or description of the proposed club, which had been requested on December 2nd, so that the Board could consider the application at its next meeting.

11. Typically, where the purpose and activities of a proposed club are not clear, students are requested to submit a written statement describing the club, its purpose and proposed activities before the request will be submitted to the Board for consideration. For example, just this past year, two high school students requested that a new literary club, "PRISM", be established. A literary club already exists at the high school. I met with the students and asked them to provide a written statement for consideration by the Board detailing the purpose

of the club, its proposed activities, and explaining why the existing club was not adequate. In addition, student clubs typically have written constitutions. This is consistent with the Commission on Secondary School of the Middle States Association of Colleges and Schools recommendation that ll student clubs have constitutions. The Middle States Association is an accrediting organization of which the Roslyn School District has been an accredited member for many years. (It recently came to our attention that a few established clubs do not have or could not locate constitutions. In accordance with the recommendations of the Association, those clubs were requested and have submitted constitutions to the administration for review).

12. Sometime in mid-December, the District received a letter, dated December 15, 1993, from Mr. Infranco, plaintiffs' counsel. The letter, addressed "To Whom It May Concern", concerned Miss Hsu's request to establish a "Bible Study Club". The letter provided no description of the purpose or activities of the club. It unilaterally imposed a January 7, 1994 deadline for the District to authorize the establishment of the club.

13. Contrary to plaintiffs' claim, on December 23, 1993, I responded to Mr. Infranco's letter. I advised him,

> "The tone of your letter implies that you believe the district has made a determination not to establish the club requested by Emily Hsu. In fact, no such determination has been made. Rather, the Board of Education is consulting

with counsel and will make a determination with all due speed. Your arbitrary deadline of January 7, 1994 notwithstanding, the district will make its determination and take appropriate action as quickly as possible. . ." (See Exhibit A).

14. On January 5, 1994, Miss Hsu delivered to Ms. Silverman a proposed constitution for consideration by the Board. The document, in addition to generally identifying the purpose and activities of the club as requested by the Board, also contained the following provisions:

ARTICLE II - Purpose

Section I: This club will provide a time of praise for students to gather in Christian fellowship.

a. Christian fellowship is when Christians gather to praise God, to encourage one another, to strengthen their walk with the Lord in dealing with life's problems, and to enjoy each other's company. (emphasis added)

* * *

ARTICLE III - Elections and Officers

* * *

Section II: Officers must be professed Christians, either through baptism or confirmation. (emphasis added)

(See Exhibit B).

15. The two constitutional provisions indicated that the club intended to discriminate against members of the student body by restricting who could become a club member and hold office, based upon the student's religious beliefs. The Roslyn Union Free School District has a well established, long-standing policy against discrimination based upon a person's sex, race, nationality, creed or religion. The Board, several years ago, specifically adopted the following policies:

EQUAL OPPORTUNITY

The Board, its officers and employees will not discriminate against any student, employee or applicant for employment on the basis of race, color, national origin, creed or religion, marital status, sex, age or handicapping condition.

This policy of nondiscrimination includes: access by students to educational programs, counseling services for students, course offerings and student activities, recruitment and appointment of employees and employment pay benefits.

EQUAL EDUCATIONAL OPPORTUNITIES

The District shall provide every student with equal educational opportunities regardless of race, color, creed, sex, national origin, religion, age, marital status or disability.

No student will be excluded on such basis from

> participating in or having access to any course offerings, athletics, counseling, employment assistance, extracurricular activities or other school resources.

(See Exhibit C). Plaintiffs' proposed constitutional provisions violate the District's nondiscrimination policies.

16. On January 24, 1994, Ms. Silverman and Mr. Rubin met with Miss Hsu to discuss the constitution. The discriminatory nature of the two provisions were pointed out to her and she was requested to consider whether neutral, nondiscriminatory provisions could be substituted. She indicated she would consider the matter. Another meeting was scheduled for January 26th.

17. On January 26, 1994, Ms. Silverman and I met with Miss Hsu to discuss the proposed constitution. I explained to her that it was the policy of the District that all clubs be open to all members of the student body on a nondiscriminatory basis and emphasized the importance of the District's nondiscrimination policies. Miss Hsu informed us that she had decided to make two changes to the proposed constitution. First, she substituted the work "people" for "Christians" in Article II, Section I thereby, eliminating the discriminatory nature of the provision. With regard to Article III, Section II, she proposed to substitute the following:

> "All members eligible to vote will also be eligible to run for offices. <u>Accepting Jesus Christ as savior is a requirement for all officers.</u> (emphasis added).

This change did not eliminate the discriminatory aspect of the provision since it continued to restrict a student's full participation in the club's activities, based upon a student's religious beliefs. In other words, in order to be eligible to be an officer of the club, a student would first have to affirmatively assert and subscribe to a particular religious belief. The discriminatory nature of the provision, even as modified, was pointed out to Miss Hsu. She indicated she would give the matter further thought.

18. On January 31, 1994, Miss Hsu met again with Ms. Silverman. She informed Ms. Silverman that she would not further modify the provision and insisted on retaining the discriminatory provision.

19. The Board met on February 3, 1994. One of the items on its agenda was the formation of plaintiffs' proposed club. In light of the discriminatory provision in the club's constitution, which was a clear violation of District's nondiscrimination policy, the Board determined that further study and consideration were needed before any action could be taken. The matter was, therefore, put over until the Board's March 10, 1994 meeting.

20. On February 11, 1994, I received a request by attorneys for the American Center for Law and Justice (ACLJ), who indicated that they presented Miss Hsu, to meet with the Board regarding the formation of the club. On or about February 15, 1994, the District's counsel advised the ACLJ that its request to meet with the Board on March 7, 1994 (three days before its next scheduled public meeting) had been granted, so

that all issues could be fully discussed and litigation, hopefully, avoided. Instead of accepting the invitation which had been extended at its request, the ACLJ advised the District's counsel that a meeting would no longer be necessary, since it had decided, instead, to commence a lawsuit.

21. Plaintiffs' lawsuit was filed on or about February 16, 1994.

22. On March 10, 1994, at the Board's regularly scheduled public meeting, the Board considered the establishment of the plaintiffs' student Christian religion club. A resolution was adopted by the Board which provides, inter alia, as follows:

> NOW, THEREFORE, BE IT RESOLVED that we hereby approve the formation of said high school student Christian religious club on the following conditions:
>
> 1. Membership in the Club shall be limited to Roslyn High School students, and no student shall be discriminated against or excluded from participating in or having access to the Club, including without limitation entitlement to be an officer of the Club, on the basis of creed or religion.
>
> 2. A Roslyn faculty member shall be assigned as a monitor to the Club in a non-participatory capacity only.

3. Non-school person may not direct, conduct, control or regularly attend activities of said Club.

4. The Club shall be allowed to meet on school premises, but only during non-school hours.

5. In accordance with the Federal Equal Access Act, no public funds will be expended to support the Club or its activities beyond the incidental cost of providing meeting space and compensation for a monitor.

(Exhibit D).

23. As a result, the Board has authorized the establishment of the club. Plaintiff can meet, engage in "Christian Fellowship", "singspiration" and the other activities set forth in the constitution. The club, however, is to be open, in all respects, to all members of the student body without regard to their religious beliefs. Students may openly express their religious beliefs at club meetings -- even as part of an election campaign. Requiring a student, however, to subscribe to a particular religious belief as a condition of eligibility to hold office is not permitted.

24. On March 15, 1994, plaintiffs were informed that the Board approved the formation of the club and advised to contact the high school principal to arrange for a meeting. (Exhibit E). The District arranged for a monitor in anticipation of club meetings. Plaintiffs have indicated that they do not

intend to comply with the District's nondiscrimination policy and, therefore, they have not held an organizational meeting.

PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

25. I am advised by counsel that a preliminary injunction is an extraordinary remedy which is not lightly granted. In order to obtain preliminary injunctive relief, I am further advised that plaintiffs have the burden of demonstrating a) irreparable harm, and b) either (1) a likelihood of success on the merits, or (2) a sufficiently serious question going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in their favor. Plaintiffs have failed to meet their burden and therefore, are not entitled to the extraordinary relief of a preliminary injunction.

26. The only issue for consideration on this motion for interim relief is whether plaintiffs are entitled to a preliminary injunction which enjoins the District to allow plaintiffs to discriminate against members of the student body based upon the students' religious beliefs. Since the Board approved the formation of the Club on March 10, 1994, the club may exist and hold meetings at the high school after school hours. Its members, at their meetings, may express their religious beliefs, participate in "singspiration", give "testimonies of their faith" and engage in the other religious based activities set forth in the constitution. Any member, even one running for office, may affirmatively state his or her religious beliefs during the campaign. Any member may vote for any candidate he or she chooses, including candidates who

have affirmatively expressed a particular religious belief. The club, however, may not discriminate against students by conditioning their eligibility to run for office upon their religious beliefs. The limitation, which is consistent with the nondiscrimination policies of the District, as well as federal and state law, is content neutral and based on a policy which has general applicability to all students. It has no impact whatsoever on plaintiffs' exercise of their religion or religious speech.

27. As a result, plaintiffs' assertion that they will suffer irreparable harm if the injunction is not granted is misplaced. Their First Amendment rights are not being denied based upon the religious content of their speech. To the contrary, the First Amendment rights of students who do not subscribe to the same religious beliefs as plaintiffs, would be infringed if the club was permitted by the District to discriminate against them based upon their religious beliefs. A requirement that all students, regardless of their religious beliefs, are eligible to hold office is not a restriction of plaintiffs' religious freedoms. Plaintiffs are free to practice their religion and participate in all the stated activities of the club. Indeed, plaintiffs themselves may be elected the officers of the club.

28. Even if the issue is viewed as one involving First Amendment rights, plaintiffs have not demonstrated a likelihood of success on the merits or that the equities tip decidedly in their favor.

29. As discussed in detail in the accompanying

memorandum of law to which the Court is respectfully referred, the outcome in this matter is not controlled by either Westside Community Schools v. Mergens, 496 U.S. 226 (199) or Lamb's Chapel v. Center Moriches Union Free School District, ___ U.S. ____, 113 S.Ct. 2141 (1993), the two cases principally relied upon by plaintiffs.

30. With regard to plaintiff's claim for "equal access," plaintiffs are not asking to be treated the same as other clubs. They are requesting special treatment. No other club in the District is entitled to discriminate against members of the student body based upon a student's religion. No other club in the District is permitted to condition full participation in club activities, including eligibility to run for office, upon a student subscribing to a particular religious belief.

31. Plaintiffs' proposed club attempts to do just that. Plaintiffs' constitutional provision, in essence, is no different than if it provided that only white students could hold office. Even if both white and African-American students could be members of the club, a provision which allows only members of one race to assume leadership positions in the student club would convey a message to the student body that white supremacy is endorsed by the District and that African-American students are not entitled to the same rights and privileges as white students. Such a result cannot be tolerated in any multi-racial, ethnic or religious community, particularly where the community is comprised of impressionable young adults who are required to attend school pursuant to State's compulsory education law (N.Y.Educ. Law §3201, et seq.) and to be part of the student community. Permitting plaintiffs' club

to have a "special privilege" which allows it to require student to have a particular religious belief as a condition of assuming a leadership role in the school would be perceived as an endorsement by the District of a particular religion. Such an endorsement is prohibited by the Establishment Clause of the United States Constitution, the New York Constitution and federal and state law.

32. Discrimination based upon a person's sex, race, nationality, creed or religion is not only illegal, it is abhorrent and destructive to the well-being of the students who attend the District's schools and disruptive to the District's educational mission. Discrimination, if it is allowed to exist, creates multiple classes of students. It breeds contempt, distrust and dissention. As part of the educational process we try to build self-esteem and confidence. Some of our high school students are as young as 14 years old. Seniors are typically only 17 or 18 years old. They are still within their formative years and often influenced by their peers and their surroundings. It is critical for the student community and the well-being of the students whose care and education are entrusted to the District that all students know that they will be treated fairly and equally based upon their ability and performance and that their treatment at school and the educational opportunities available to them are not based upon their religion, sex, nationality or the color of their skin.

33. The District, recognizing the importance of developing a cohesive student community which respects its members, regardless of their race, sex, nationality, creed or religious beliefs, has strived to create an atmosphere where

students are sensitive to the feelings of other students and where students know that they will be treated fairly not only by the faculty and administration but also by their fellow students. One of the ways we have tried to do this is through the establishment of a Human Relations Committee which meets monthly to discuss ways to develop a positive sense of community in our District. Student respect and self-esteem, ethnic awareness, the problems caused by student cliques and peer pressure, student relationships, gender equity, multi cultural curriculum, and student sensitivity are just some of the issues we try to address through a comprehensive program of meetings and activities. We have also attempted to reach out to the community at large to help us address and deal with issues of divisiveness. For example, we have established a liaison with the parents of our African-American students, and hold periodic meetings with various community and religious leaders to discuss and address issues affecting our student community. All of these efforts are undertaken with the goal of developing a harmonious student community based upon mutual respect and self-esteem, and not one which affords rights and privileges to a select group of students, based upon a discriminatory criteria. As a result, the District has a compelling interest in assuring that all students are treated fairly and in protecting them against the exercise of unlawful discrimination.

34. Plaintiffs' argument that the District has no place "meddling" with the structure of the club misses the point. Simply because plaintiffs wish to form a "religious" club does not mean that the District must abdicate all authority, shut its eyes and turn a deaf ear on any activity that the club

wishes to engage in, no matter how harmful or disruptive. Simply proclaiming their club to be a "religious club" does not entitle plaintiffs to engage in any conduct they choose in the name of their religion. For example, if a "religion" club chooses to sell use illegal contraband, obviously the District is not required to ignore the conduct and allow it to continue. To do so would effectively endorse the conduct. In the same regard, the District should not be required to stand idly by and allow unlawful activity in the form of religious discrimination to occur in its schools. Indeed, to do so might subject the District to a discrimination suit by other students or the loss of federal funds and other penalties.

35. Moreover, allowing plaintiffs' discriminatory provision to take effect would not only require the District to utilize its limited resources to counter its disruptive effect on the student community, it would also ultimately lead to excessive entanglement by the District in religious matters. For example, if a student wished to run for club office and was denied the opportunity to do so because some club members felt that he or she did not sincerely hold certain religious beliefs, the student would turn to the District for help. If the District ignored his plea, it would indicate to the student community that the District had endorsed plaintiffs' religion by affording their club special protection and treatment. If the District, on the other hand, took action, it would be placed in the position of having to determine whether the constitutional provision was being properly applied by the club. By the very nature of the issue, the District would be forced to examine, evaluate and determine the bona fides, depth, nature and extent of the students' religious beliefs -- something which is

obviously inappropriate for the District to do. In contrast, a nondiscriminatory criteria for eligibility to hold office applicable to all clubs is content neutral. It does not advance or inhibit any religion. It does not require an examination of the sincerity of a student's religious beliefs. As a result, excessive entanglement by the District in religious matters is avoided.

36. In addition, it appears that plaintiffs' motion is, at best, premature. The Board's resolution does not require that the club's officers be non-Christians. Who the officers will be, and what their duties are, will be determined by the membership when the club meets. Plaintiffs apparently have decided not to hold an organizational meeting, speculating that the club membership will be dominated by non-Christians whose sole intent is to destroy the club. This speculation is unjustified. Plaintiffs have offered no proof that this is going to occur. Indeed, it is very possible that plaintiffs themselves will be elected to office. Plaintiffs' desire to limit the pool of eligible candidates is actually more a political issue than a religious one. Their unfounded and unsupported fear that a student whose religious views are inconsistent their own might be elected to office is not sufficient to establish the imminent injury needed to support issuance of a preliminary injunction.

37. In conclusion, it is clear that plaintiffs are not entitled to a preliminary injunction. The club has been approved by the Board and plaintiffs may meet on the same basis as other student clubs. A restriction which prohibits plaintiffs from discriminating against students as to who may run for office, based upon their religious beliefs, does not abridge plaintiffs' First Amendment rights. However, even if

plaintiffs' First Amendment rights are implicated, the District has a compelling interest in prohibiting discrimination based upon a student's religion. The District's nondiscrimination policy is a reasonable campus law. It promotes the educational mission of the District and protects the welfare of the students. The policy has a secular purpose, it is content neutral, applies generally to all students, does not have the effect of advancing or inhibiting religion, does not substantially burden plaintiffs' exercise of their religion, and avoids excessive entanglement by the District in religious matters. The only person that the nondiscrimination provision impacts upon is a person who wishes to engage in unlawful discrimination.

WHEREFORE, it is respectfully requested that plaintiffs' motion for a preliminary injunction be denied.

/s/ Frank A. Tassone
DR. FRANK A. TASSONE

Sworn to before me this
21st day of March, 1994

/s/ Stanley A. Camhi
Notary Public

[Exhibits to Affidavit are not Reproduced]

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